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Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

O.L. McCOTTER, DIRECTOR
TEXAS DEPARTMENT OF CORRECTIONS,
Petitioner,

V.

GREGORY ALLEN PETTY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JIM MATTOX
Attorney General of Texas

MARY F. KELLER
Executive Assistant Attorney General for Litigation

F. SCOTT McCOWN
Assistant Attorney General
Chief, Enforcement Division

WILLIAM C. ZAPALAC
Assistant Attorney General

CHARLES A. PALMER*
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 463-2080

**Attorney of Record*

QUESTIONS PRESENTED

I. WHETHER A HABEAS PETITIONER WHO CLAIMS THAT HE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL MUST ALLEGE HOW HE WAS PREJUDICED BY COUNSEL'S PERFORMANCE.

II. WHETHER A FEDERAL APPELLATE COURT SHOULD CONSIDER UNEXHAUSTED ISSUES RAISED FOR THE FIRST TIME ON APPEAL BY A HABEAS PETITIONER-APPELLANT AND REMAND TO ALLOW AMENDMENT OF THE PETITION TO INCLUDE THOSE ISSUES.

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES O.L. McCotter, Director, Texas Department of Corrections, Petitioner[1] herein, by and through his attorney, the Attorney General of Texas, and files this Petition for Writ of Certiorari.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit was delivered on January 3, 1986, and is attached hereto as Appendix F; the order denying rehearing is attached as

1. For clarity, petitioner in this Court and respondent below, O.L. McCotter, Director, Texas Department of Corrections, will be referred to as the state, the real party in interest. Respondent in this Court and petitioner below, Gregory Allen Petty, will be referred to as Petty.

Appendix G. *Petty v. McCotter*, 779 F.2d 299, (5th Cir. 1986). The federal district court's order of dismissal and final judgment are attached as Appendices D and E, and the underlying magistrate's report and recommendation is attached as Appendix C. *Petty v. McKaskle*, No. CA5-84-34 (N.D. Tex.) (unpublished).

JURISDICTION

The judgment of the Court of Appeals was entered on January 3, 1986. A timely filed suggestion for rehearing *en banc* was denied on March 4, 1986. This petition for writ of certiorari if filed within thirty days after final judgment in the court below. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Rule 2(c), 28 U.S.C. fol. § 2254 provides, in pertinent part, as follows:

> The petition . . . . shall specify all the grounds for relief which are available to the petitioner and of which he has or by the exercise of reasonable diligence should have knowledge and shall set forth in summary form the facts supporting each of the grounds thus specified.

Rule 4, 28 U.S.C. fol. § 2254 provides, in pertinent part, as follows:

> The original petition shall be presented promptly to a judge of the district court in accordance with the procedure of the court for the assignment of its business. The petition shall be examined promptly by the judge to whom it is assigned. If it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court, the judge shall make an order for its summary dismissal and cause the petitioner to be notified. Otherwise the judge shall order the respondent to file an answer or other pleading within the

> period of time fixed by the court or to take such other action as the judge deems appropriate.

Rule 8(a), 28 U.S.C. fol. § 2254 provides, in pertinent part, as follows:

> If the petition is not dismissed at a previous stage in the proceedings, the judge, after the answer and the transcript and record of state court proceedings are filed, shall, upon a review of those proceedings and of the expanded record, if any, determine whether an evidentiary hearing is required.

Rule 9(b), 28 U.S.C. fol. § 2254 provides as follows:

> A second or successive petition may be dismissed if the judge finds that if fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

STATEMENT OF THE CASE

The state has lawful custody of Petty pursuant to a judgment and sentence of the 99th District Court of Lubbock, County, Texas, in Cause No. 19,914, styled *The State of Texas v. Greg Allen Petty.* Petty was charged by indictment with the felony offense of aggravated robbery, to which he entered a plea of not guilty. After a jury trial, Petty was found guilty and his punishment was set at fifty years imprisonment in the Texas Department of Corrections. Sentence was imposed on September 20, 1979. The Texas Court of Criminal Appeals affirmed on April 17, 1983, in an unpublished *per curiam* opinion. *Petty v. State,* No. 64,750. Petty has filed one state application for writ of habeas corpus, and it was denied by the Court of Criminal Appeals on October 5, 1983. *Ex parte Petty,* No. 10,573.

Petty then filed a petition for writ of habeas corpus in the United States District Court for the Northern District of Texas,

Lubbock Division. *Petty v. Procunier,* No. CA5-84-034. The United States Magistrate to whom the case was referred made findings of fact and conclusions of law and recommended that relief be denied. The district court adopted the magistrate's findings and recommendation and ordered the case dismissed on May 14, 1984.

Petty perfected an appeal to the Court of Appeals for the Fifth Circuit. *Petty v. McCotter,* No. 84-1488. After Petty filed his *pro se* brief and the state filed a brief in response, the court granted Petty's motion for appointment of counsel, and appointed counsel thereafter filed a supplemental brief. The *pro se* brief filed by Petty raised two specific allegations of ineffective assistance of counsel which were not raised in the district court. First, Petty for the first time complained that trial counsel should have investigated why he was missing several teeth at the time of his guilty plea. Second, Petty asserted that trial counsel failed to investigate the possible defense of insanity. *See* Appendix F at 3-4. The court below addressed the first of these grounds, finding it to be meritless. *Id.* at 4. As to the second allegation, however, the Fifth Circuit remanded. First, the court below held that "*Strickland [v. Washington,* 466 U.S. 668 (1984)] requires that prejudice be proved, not pleaded." *Id.* at 5. In the alternative, the court held that Petty should be allowed to amend his petition in the district court to raise his new, unexhausted allegations of ineffective assistance of counsel.

> We are a court of error and ordinarily do not consider issues raised for the first time on appeal. The fact that Petty has now made these allegations, however, indicates that he would raise them in the district court if he were given the opportunity to do so. Therefore, even if a pro se petitioner is required to allege specific prejudice that he must eventually prove, Petty should be given an opportunity to amend his pleadings in order to assert what he now contends.

Id. at 4-5.

The state timely filed a suggestion for rehearing *en banc* raising the two questions presented in the instant petition, and

it was summarily denied. *See* Appendix G. On March 19, 1986, the Fifth Circuit granted the state's motion to stay the mandate to and including April 3, 1986.

SUMMARY OF ARGUMENT

There are special and important reasons for granting the writ. In holding that a federal habeas petitioner need not plead prejudice as part of his claim of ineffective assistance of counsel, the Fifth Circuit completely ignored this Court's decision in *Hill v. Lockhart*, _____U.S._____, 106 S.Ct. 366 (1985). Because the holding of the court below is in irreconcilable conflict with *Hill*, this Court should grant certiorari and summarily remand for reconsideration in light of *Hill*.

Of even greater significance, however, is the Fifth Circuit's radical departure from established appellate procedure in its treatment of the issues Petty raised for the first time on appeal. By remanding to allow Petty to amend his petition to include unexhausted issues raised for the first time in that court, the Fifth Circuit ignored the rule that issues first presented on appeal ordinarily will not be considered. If its opinion is allowed to stand, it will profoundly affect the manner in which habeas petitions are handled in that circuit. Lacking prescience, the district courts will not be able to foresee what new claims may be raised on appeal. The Fifth Circuit's opinion, by remanding to allow for the inclusion of new issues on appeal, robs the district courts' judgments of their finality. This holding also works unfairly in that it deprives the state of an opportunity to plead abuse of the writ under Rule 9(b), 28 U.S.C. fol. §2254 in response to either an amended application or a second application filed by Petty.

REASONS FOR GRANTING THE WRIT

I.

THERE ARE SPECIAL AND IMPORTANT REASONS TO GRANT THE WRIT.

There are two profoundly important reasons why this Court should review the judgment of the court below. First, as

discussed in Part II, *infra*, the Fifth Circuit's interpretation of the pleading requirements of Rule 2(c), 28 U.S.C. fol. § 2254 and *Strickland v. Washington*, 466 U.S. 668 (1984) is in direct conflict with *Hill v. Lockhart*, _____U.S._____, 106 S.Ct. 366 (1985). This Court should not countenance the Fifth Circuit's disregard of this controlling precedent.

Second, as discussed in Part III, *infra*, the Fifth Circuit's treatment of Petty's new issues on appeal will have a very significant impact on the manner in which federal habeas petitions are processed in the district courts of that circuit. Under the Fifth Circuit's holding, the district courts' judgments are robbed of any semblance of finality. Further, and equally as important, the Fifth Circuit's rule provides habeas petitioners with an unprecedented means to circumvent the successive petition doctrine of Rule 9(b), 28 U.S.C. fol. 2254.

II.

HILL V. LOCKHART, _____U.S._____, 106 S.CT. 366 (1985) REQUIRES THAT A HABEAS PETITIONER CLAIMING INEFFECTIVE ASSISTANCE OF COUNSEL SPECIFICALLY PLEAD PREJUDICE.

Strickland v. Washington, 466 U.S. 668 (1984) teaches that a habeas petitioner who claims that he received the ineffective assistance of counsel has the burden of demonstrating both that counsel's performance was deficient and that the deficient performance prejudiced the defense. The Fifth Circuit's opinion in this cause held that "*Strickland* requires that prejudice be proved, not pleaded." *See* Appendix F at 5. This holding conflicts with *Hill v. Lockhart*, _____U.S._____, 106 S.Ct. 366 (1985). *Hill* applied the two-prong test of *Strickland* to ineffective assistance claims in the context of a guilty plea and held that a habeas petitioner who claims a sixth amendment violation must plead both prongs:

> In the present case the claimed error of counsel is erroneous advice as to eligibility for parole under the sentence agreed to in the plea bargain. We find it unnecessary to determine whether erroneous advice by

> counsel as to parole eligibility may be deemed constitutionally ineffective assistance of counsel, because in the present case we conclude that petitioner's allegations are insufficient to satisfy the *Strickland v. Washington* requirement of "prejudice." Petitioner did not allege in his habeas petition that, had counsel correctly informed him about his parole eligibility date, he would have pleaded not guilty and insisted on going to trial. He alleged no specific circumstances that might support the conclusion that he placed particular emphasis on his parole eligibility in deciding whether or not to plead guilty. Indeed, petitioner's mistaken belief that he would become eligible for parole after serving one-third of his sentence would seem to have affected not only his calculation of the time he likely would serve if sentenced pursuant to the proposed plea agreement, but also his calculation of the time he likely would serve if he went to trial and were convicted.
>
> Because petitioner in this case failed to allege the kind of "prejudice" necessary to satisfy the second half of the *Srickland v. Washington* test, the District Court did not err in declining to hold a hearing on petitioner's ineffective assistance of counsel claim.

Id. at_____, 106 S.Ct. at 371 (record citation omitted). The holding of the court below cannot be squared with *Hill.*

Further, there are very important practical considerations which support the *Hill* requirement that a federal habeas petitioner affirmatively plead the manner in which he was prejudiced by the acts or omissions of allegedly ineffective counsel. Federal habeas procedures contemplate the district courts acting as a "screen" for the many applications filed each year.[2] Thus, Rule 2(c), 28 U.S.C. fol. § 2254, requires that the petitioner support his legal claims with factual allegations, and Rule 4 provides that the district court may summarily dismiss a peti-

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2. "The federal district judges are more intimately familiar with state criminal justice, and with the trial of fact, than we are, and to their sound discretion must be left in very large part the administration of federal habeas corpus." *Townsend v. Sain,* 372 U.S. 293, 313 (1963).

tion which on its face shows that the petitioner is not entitled to relief. Similarly, the district court need not conduct an evidentiary hearing under Rule 8(a) unless there are disputed, material facts which cannot be resolved on the record. *See Townsend v. Sain*, 372 U.S. 293, 312-320 (1963). The holding of the court below disserves these substantial policies by poking a hole in the "screen" created by the pleading requirements of Rule 2(c). This Court should grant certiorari and summarily remand to the Fifth Circuit for reconsideration in light of *Hill*.

III.

BY CONSIDERING UNEXHAUSTED ISSUES RAISED FOR THE FIRST TIME ON APPEAL AND REMANDING TO ALLOW THE HABEAS PETITIONER-APPELLANT TO AMEND HIS PETITION TO INCLUDE THOSE ISSUES, THE OPINION OF THE COURT BELOW UNFAIRLY DEPRIVES THE STATE OF AN OPPORTUNITY TO PLEAD ABUSE OF THE WRIT UNDER RULE 9(B), 28 U.S.C. FOL. §2254.

A. *The Fifth Circuit's disposition of Petty's new claims constitutes a radical departure from settled appellate procedure.*

It is a well established principle of appellate review in both this Court and the Fifth Circuit that issues not raised in or considered by the court below will not be allowed on appeal. *E.g., Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981); *Miree v. DeKalb County, Ga.*, 433 U.S. 25, 33-34 (1977); *Smith v. United States Parole Commission*, 752 F.2d 1056, 1057 n.1 (5th Cir. 1985); *Baker v. Estelle*, 711 F.2d 44, 45-46 (5th Cir. 1983). There are, to be sure, exceptions to this rule. For example, this Court has not hesitated "in the interests of judicial administration" to address an issue not raised in the courts below where the issue was important and recurring, where it had been fully briefed and where the respondent did not object to its determination by this Court. *Carlson v. Green*, 446 U.S. 14, 16 n.2 (1980). Similarly, the Fifth Circuit will consider new issues on

appeal which involve purely legal questions[3] when the failure to consider them would result in a miscarriage of justice. *Self v. Blackburn*, 751 F.2d 789, 793 (5th Cir. 1985); *United States v. Velasquez*, 748 F.2d 972, 973-74 (5th Cir. 1984).

The instant case fits into neither exception. Here, the new issues raised on appeal involve intensely factual matters which cannot be resolved without a hearing. Thus, the Fifth Circuit's consideration of these matters did not aid in the final disposition of this cause and can in no sense be said to further the orderly administration of justice. Quite to the contrary. Since Petty's new claims have not been presented to the state courts, as required by 28 U.S.C. § 2254(b), (c), amendment of his petition to include them will render it subject to dismissal under *Rose v. Lundy*, 455 U.S. 509 (1982) for failure to exhaust state remedies.[4] The Fifth Circuit's approach works to perpetuate this action in both the state and federal system. It thus disserves valid interests in the orderly administration of justice and, as discussed in Part II, *supra*, at 7-8, frustrates the screening process entrusted to the district courts by the habeas rules. The immense burden placed on the district courts by suits under 28 U.S.C. § 2254 has received considerable attention, and there are currently two bills pending in Congress which are designed to alleviate this problem, H.R. 1127 and S. 238. The Fifth Circuit's holding exacerbates the problem.

Further, to the extent the opinion implies that Petty was not afforded an opportunity to amend his petition in the district court, it is factually incorrect. The state's responsive pleading (the pertinent part of which is attached as Appendix B) and the magistrate's report and recommendation (attached as Exhibit C), specifically informed Petty that his allegation of a sixth amendment violation (attached as Exhibit A) was deficient.

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3. A question is purely legal if no facts could have been raised to develop the issue at an evidentiary hearing. *United States v. Velasquez*, 748 F.2d 972, 974 (5th Cir. 1984); *Higginbotham v. Ford Motor Co.*, 540 F.2d 762, 768 n.10 (5th Cir. 1976).

4. The Fifth Circuit's opinion opines that "[i]n the interests of efficiency and finality, . . . the state may prefer to waive this defense." *See* Appendix F at 5. There is nothing in the record to support this statement and the state assures this Court that is does not and will not waive Petty's non-exhaustion of state remedies.

Although put on ample notice, Petty did not correct this shortcoming in the district court and made no factual allegations in support of his sixth amendment claim until his case reached the Court of Appeals.

The Fifth Circuit's reasoning allowing consideration of those new claims creates an exception which swallows the rule. Is it not true that a party who raises new claims in a higher court invariably thus evinces a desire to "raise them in the district court if he were given the opportunity to do so"? Adherence to such a standard can have but one result: evisceration of the proscription against new issues on appeal. The "screening process" envisioned by the federal habeas rules is thus destroyed and the judgments of the district courts are robbed of their finality. Further, the habeas petitioner is afforded an unwarranted second opportunity to plead his case. If he is unable to prevail on his initial, conclusory allegations, he need only make additional allegations on appeal in order to obtain a remand with directions to allow him to amend.

B. *The result of the decision of the court below is to deny the state the opportunity to plead abuse of the writ under Rule 9(b), 28 U.S.C. fol. § 2254.*

The real mischief of the Fifth Circuit's holding, however, is that it works to unfairly deprive the state of the opportunity to plead the defense of abuse of the writ pursuant to Rule 9(b), 28 U.S.C. fol. § 2254. Rule 9(b) is designed to preclude vexations, piecemeal litigation of habeas claims. It provides that:

> A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

The state's entitlement to a Rule 9(b) dismissal depends on several factors, not the least of which is that the petitioner's prior application(s) be decided "on the merits." *See Jones v. Estelle*, 722 F.2d 159, 168 (5th Cir. 1983) (en banc), *cert. denied*, _____U.S._____, 104 S.Ct. 2356 (1984) ("dismissal of a

mixed petition [for failure to exhaust state remedies] does not create a hurdle of writ abuse on Petitioner's return.") Here, the claims raised in Petty's application in the district court were reviewed on the merits and rejected by that court. Had the court below followed the normal procedure and refused to consider issues raised for the first time on appeal, it simply would have affirmed the district court's denial of relief. Thus, in the event of a successive petition raising new claims, the state would have been able to plead abuse of the writ based on the merits review afforded Petty in the instant cause. This is not to say that a Rule 9(b) motion ultimately would succeed, or even that it would be appropriate.[5] Under such a disposition, however, the state would have had the option of pleading abuse of the writ in a subsequent proceeding.

By remanding to allow Petty to amend his petition to include allegations first made in the appellate court, the opinion unfairly deprives the state of its Rule 9(b) defense. Because there has been no appellate review of the judgment of the district court, there is no finality to that court's review on the merits, and thus Rule 9(b) would not apply to Petty's amended petition.[6] By the same token, if Petty's amended petition is dismissed for failure to exhaust state remedies, the state is likewise deprived of its Rule 9(b) defense.

CONCLUSION

For these reasons, Petitioner prays that the petition for writ of certiorari to the Court of Appeals for the Fifth Circuit issue and, as to the first question presented, that this cause be

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5. The district courts are free to review successive petitions where "the applicant shows that the ends of justice would be served by permitting redeterminations of the ground." *Sanders v. United States*, 373 U.S. 1, 16 (1963).

6. There is authority for the application of Rule 9(b) to an amended petition which raises new claims. *See Cody v. Missouri Board of Probation and Parole*, 468 F.Supp. 431, 434-35 (W.D. Mo. 1979). The state does not understand the law of the Fifth Circuit to be consistent with *Cody*, however, and as a practical matter it would be futile to plead abuse in the district court in response to an amended petition explicitly sanctioned by a higher court.

remanded to the Court of Appeals for reconsideration in light of *Hill v. Lockhart*, _____U.S._____, 106 S.Ct. 366 (1985).

Respectfully submitted,

JIM MATTOX
Attorney General of Texas

MARY F. KELLER
Executive Assistant Attorney
General for Litigation

F. SCOTT McCOWN
Assistant Attorney General
Chief, Enforcement Division

WILLIAM C. ZAPALAC
Assistant Attorney General

CHARLES A. PALMER*
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 463-2080

Attorneys for Petitioner

**Attorney of Record*

APPENDIX A

1. Ground one: *Denied effective assistance of Counsel.*

Supporting FACTS (tell your story briefly without citing names or law):

The fact of this case vividly illustrate legal representation utterly failing to meet minimal constitutional standards. Viewed most charitably the performance of my court-appointed attorney was at best perfuncorty. As a preliminary matter it should be plainly stated that explanation for the substandard performance of Counsel in my case; is self-evident from the record believing me to be guilty of the offense charge, she naturally assumed that I would eventually enter a plea of guilty to the indictment, thereby the obviating the necessity for a jury trial and the investigation and preparation necessary incident to it. When I persisted in denying my guilt and demanding a trial, Counsel was (So to speak) caught flatfooted and was therefore compelled to defend the accusation in a state of virtually total unpreparedness. Failure to interview prospective defense witnesses prior to trial all of these circumstances explain what happened as clearly and as persuasively as if Counsel had candidly admitted that she did not feel it necessary to devote to much time to the case of a man she believed to be obviously guilty.

Counsel only conferred with me one time before trial. This interview was only to receive a brief knowledge of the case, and too deliver the Assistant District Attorney's plea bargain deal. This discussion was directed toward me making a possible plea of guilty to the charge and further asking me, to consider the deal proposed by the State. Never was there a discussion of a possible defense and the address of my witnesses mentioned by Counsel.

Counsel neglected to explain the full legabity of the offense for which I was charged and indicted. Obviously the adequacy of a court-appointed attorney consultations with there client prior to trial cannot be evaluated simply in terms of the number of times or the length of there discussions. On the other hand, where (as here) a criminal defendant is facing the possibility

of fifty (50) years which I ultimately received, and persistently maintains my innocence, there must certainly be a corresponding greater obigation on the part of an attorney in preparing for trial to assure thereself that they are thoroughly fimiliar both with the facts of the case from the State's perspective and the defendants version of those facts. Certainly, an attorney cannot render reasonably effective assistance unless they have acquated themself with the law and facts of the case.

APPENDIX B

(1) Petitioner contends that he was denied effective assistance of counsel. Respondent denies this allegation. Petitioner alleges that counsel failed to interview prospective defense witnesses, only conferred with Petitioner one time before trial, did not discuss with Petitioner possible defenses or possible witnesses, and was totally unprepared for trial. Petitioner was not entitled to perfect counsel nor is counsel to be judged by hindsight. Petitioner was only entitled to counsel reasonably likely to render and rendering reasonably effective assistance, and whether Petitioner received reasonable effective assistance is determined from a review of the totality of the representation furnished. *See Baldwin v. Blackburn*, 653 F.2d 942, 946 (5th Cir. 1981); *Nelson v. Estelle*, 642 F.2d 903, 906 (5th Cir. 1981); *MacKenna v. Ellis*, 280 F.2d 592 (5th Cir. 1960). To prevail, Petitioner must also demonstate an identifiable lapse on the part of counsel and some actual, adverse impact upon the fairness of his trial resulting from such lapse, and mere conclusory allegations are insufficient to demonstrate ineffectiveness of counsel. *See Blackledge v. Allison*, 431 U.S. 63, 75-76 (1976); *Rubio v. Estelle*, 689 F.2d 533 (5th Cir. 1982); *Sneed v. Blackburn*, 569 F.2d 854 (5th Cir. 1978); *Bryan v. Elliott*, 472 F.2d 572 (5th Cir. 1973).

Petitioner does not allege what pretrial investigation should have been conducted by counsel that was not conducted or how his defense would have been materially benefitted by any additional investigation by counsel; Petitioner does not allege what witnesses should have been interviewed by counsel that were not, does not allege what those witnesses would have testified to that would have been material to any defense of Petitioner, or that those witnesses would have in fact testified or that their testimony would have been admissible. Petitioner concedes in his petition that counsel did confer with Petitioner to receive a knowledge of the case, but Petitioner does not demonstrate how additional conferences would have benefitted counsel or any defense of Petitioner.

A review of the state records also reflects that counsel was appointed to represent Petitioner approximately two months

prior to Petitioner's trial. It also appears that this same counsel had been appointed to represent Petitioner in another case in Cause in Cause No. 18594, 99th District Court, Lubbock County, Texas, on application for revocation of probation. It also appears that in Petitioner's present conviction another counsel also assisted petitioner's appointed counsel. The records reflect that Petitioner's counsel thoroughly voir dired the prospective jurors to obtain a fair and impartial jury, fully cross-examined the witnesses for the state which indictated that counsel was familiar with the facts and the law involved in this case, made reasonable objections to testimony and evidence, many of which were sustained, and made final jury argument. A review of the totality of the representation furnished to Petitioner by his counsel clearly shows that counsel loyally and competently represented Petitioner.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS LUBBOCK DIVISION

GREGORY ALLEN PETTY,	§	
	§	
PETITIONER	§	
	§	
VS.	§	CA5-84-34
	§	
D.V. McKASKLE,	§	
DIRECTOR	§	
TEXAS DEPT. OF	§	
CORRECTIONS,	§	
	§	
RESPONDENT	§	

REPORT AND RECOMMENDATION

Petitioner, Gregory Allen Petty, is a state prisoner by virtue of judgment and sentence of the 99th District Court of Lubbock County, Texas, in cause number 19914. He was found guilty after jury trial under an indictment charging him with the felony offense of aggravated robbery and on the 20th day of September, 1979, the trial judge sentenced him to serve an indeterminate term of not less than five years nor more than fifty years in Texas Department of Corrections. The Texas Court of Criminal Appeals affirmed the conviction by its per curiam opinion delivered April 27, 1983.

Petitioner has filed application for writ of habeas corpus pursuant to 28 United States Code §2241 et seq. and is proceeding *in forma pauperis.* Liberally construing his *pro se* pleadings he contends that (1) he was denied effective assistance of counsel; (2) the indictment was fundamenally defective; (3) the evidence was insufficient to support the conviction for aggravated robbery; (4) the state failed to prove beyond a reasonable doubt that the knife used in commission of the robbery was a deadly weapon; (5) he was forced to incriminate himself when he was required to stand and open his mouth;

and (6) the "in court" identification was tainted with an impermissibly suggestive pretrial identification.

The state court record, consisting of the statement of facts of the trial, the transcript of all state court proceedings, the briefs on appeal, and the comprehensive opinion of the Texas Court of Criminal Appeals, has been filed in this case. The latter four challenges advanced in the petition before this court had been raised by petitioner on direct appeal. Also the Court of Criminal Appeals had discussed in its opinion the contention by petitioner in his pro se brief that the indictment was fundamentally defective on bases other than those which he has raised in this application for habeas relief. After those challenges had been rejected by the appellate court petitioner filed application for writ of habeas corpus in the trial court, contending that he had been denied effective assistance of counsel and that the indictment was fundamenally defective on the same bases as those which he has raised in the application before this Court. The trial judge filed findings of fact and conclusions of law on August 3, 1983, and the Court of Criminal Appeals denied the application without written order on October 5, 1983. Petitioner has substantially exhausted available state remedies.

A summary of the facts developed at the trial will be helpful to this memorandum. The evidence adduced at trial reflects that the complaining witness, a thirty-seven year old female, was walking home from a Tupperware party late in the evening on May 29, 1979. As she was bending down to remove a stone from her shoe, petitioner approached her, struck up a conversation with her, and began walking with her. They walked together for approximately five minutes until the complaining witness turned east on another street and left petitioner. After she had walked on that new street for a few minutes she heard a noise and, looking around, she noticed that petitioner again was behind her. Petitioner asked her to take her clothes off and when she refused he grabbed her, pulled a knife, and threatened to cut her throat. She testified that petitioner grabbed her blouse and tore it. Further, while still holding the knife, petitioner attempted to take her pants off. At that point she sat down in the middle of the street to make it more difficult for petitioner. Petitioner put the knife in his pocket, grabbed her

purse, and ran. The complaining witness went to a friend's house which was located nearby and telephoned the police. Two police cars came in response to her call. While she was giving a statement to an officer in one car, the officers in the other car drove off to search the area. A few minutes later those officers called to say that they had detained a suspect. Petitioner identified the suspect as her attacker. In a search of his motel room the purse belonging to the complaining witness was discovered.

The first challenge advanced by petitioner is to the effectiveness of the attorney who had been appointed to represent him. Petitioner contends that the performance by the attorney was, at best, perfunctory, that she had conferred with him only one time prior to trial and on that occasion she attempted to persuade him to plead guilty and she was unprepared for jury trial, and that she failed to interview prospective defense witnesses.

A habeas corpus petitioner has the burden to demonstrate by sufficient factual allegation and proof an identifiable lapse on the part of counsel as well as some actual adverse impact upon the fairness of his trial which results from that lapse. *Boyd v. Estelle*, 661 F2d 388 (5th Cir. 1981); *Washington v. Watkins*, 655 F2d 1346 (5th Cir. 1981). In this case petitioner has not met that burden. Although he contends that the attorney failed to interview prospective defense witnesses and failed to prepare for trial, he has not identified any witnesses who should have been interviewed by the attorney nor has he identified any trial preparation or investigation which the attorney should have made but failed to do. Further, he has not demonstrated any actual adverse impact upon the fairness of his trial which resulted from those claimed deficiencies. Review of the record of the trial reflects that the attorney had examined the jury panel on voir dire and had selected a jury. She cross-examined witnesses and she made an argument to the jury. The "in court" identification by the complaining witness of petitioner as her attacker was positive and the facts with which the attorney had to operate restricted possible defenses. The determination of whether an accused received reasonably effective assistance of counsel is predicated upon the entire record and the totality of the circumstances surrounding the trial performance.

Washington v. Estelle, 648 F2d 276 (5th Cir. 1981). When the entire record is viewed the representation afforded by appointed counsel was well within the standard of *MacKenn v. Ellis*, 280 F2d 592, 599 (5th Cir. 1960) wherein the Fifth Circuit defined the constitutional standard as not being errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and actually rendering reasonably effective assistance.

On direct appeal petitioner, by his pro se brief, had contended that the indictment was fundamentally defective when it failed to allege that petitioner committed theft "with the intent to obtain and maintain control of property." Petitioner now contends that the indictment was fundamentally defective when it failed to allege that the complaining witness was the owner of the United States currency that allegedly was taken in the robbery and when it failed to allege that she had a greater right to the currency than did petitioner. Those challenges must fail for a number of reasons.

The indictment, in pertinent part, alleged that petitioner "...did then and there while in the course of committing theft and with intent to appropriate property of Edna Faye Mars, to-wit: good and lawful United States currency without the effective consent of the said Edna Faye Mars and with intent to deprive the said Edna Faye Mars of said property, did then and there by using and exhibiting a deadly weapon, to-wit: a knife, that in the manner of its use and intended use was capable of causing death and serious bodily injury, intentionally and knowingly placed the said Edna Faye Mars in fear of imminent bodily injury..."

As a threshold matter no pretrial or trial objection to the indictment was advanced. Under Texas law the failure to file motion to quash the indictment constitutes waiver. *Vaughn v. State*, 530 SW2d 558 (Tex. Crim. 1975). That procedural default bars federal habeas review of the merits, absent showing of "cause" for and "prejudice" by the default. *Wainwright v. Sykes*, 433 U.S. 72 (1977). Further, the sufficiency of a state indictment is not a matter for federal habeas corpus relief unless it can be shown that the indictment is so defective that the convicting court had no jurisdiction. *Branch v. Estelle*, 631 F2d

1229, 1233 (5th Cir. 1980). Although an indictment must allege each and every essential element of an offense to pass constitutional muster the law does not compel a ritual of words. The validity of an indictment is governed by practical, not technical, considerations and must be read as a whole to determine its meaning. An indictment is sufficient if it contains the elements of the offense charged and fairly informs the accused of the charge against which he must defend and if it enables him to plead acquittal or conviction in bar of future prosecutions for the same offense.

In this case the challenges advanced by petitioner are frivolous. The Court of Criminal Appeals, in its analysis of the indictment, found that petitioner's contention that the indictment did not allege that petitioner committed theft "with the intent to obtain and maintain control of property" should be rejected because the intent to appropriate, which was alleged, is the same as the intent to obtain or maintain control of property. In the application before this Court petitioner contends that there was no allegation that Edna Faye Mars was the owner of the United States Currency nor that she had any greater right to it than did he. Those contentions are belied by the allegations in the indictment. The indictment challenged that petitioner "... while in the course of committing theft and *with intent to appropriate property of Edna Faye Mars, to-wit: good and lawful United States currency* without the effective consent of the said Edna Faye Mars and *with intent to deprive the said Edna Faye Mars of said property,....*" (emphasis added) The allegations in the indictment clearly shows that the money which was taken in the robbery was property that belonged to the complaining witness.

The third challenge advanced by petitioner in this complaint is that the evidence was insufficient to support the conviction of aggravated robbery because the state failed to prove that petitioner used or exhibited a deadly weapon during the commission of the robbery. That challenge should be considered together with his fourth contention....that the state failed to prove beyond a reasonable doubt that the knife used in commission of the robbery was a deadly weapon. The Texas Court of Criminal Appeals, in its comprehensive opinion, noted that petitioner had stuck the complaining witness in the throat with

his knife. The complaining witness had described the knife as being a "regular sized pocket knife" with a dull tip and stated that because of the dull tip the knife did not cut her skin when she was stuck with it. However, during the entire episode petitioner held his knife at her throat. The Court of Criminal Appeals found that from the manner and intent of its use the evidence was established to support the conclusion that the knife was a deadly weapon. That finding by the appellate court is supported by the factual record, is not clearly erroneous, and, since petitioner has demonstrated no exception to presumption of correctness, the findings should be adopted by this Court. *See Sumner v. Mata*, 449 U.S. 539 (1981).

The Texas Court of Criminal Appeals also had rejected petitioner's contentions that he was forced to incriminate himself and that the "in court" identification was tainted with an impermissibly suggestive pretrial identification. However, that court based its rejection on the fact that no objection had been made at the time of trial and therefore nothing was preserved for review. Although that procedural default could prevent this court from reaching the merits of the challenges absent showing of "cause" and "prejudice" those merits will be addressed by this memorandum.

During the trial complaining witness described the clothing worn by her assailant. When the prosecutor asked her whether there was anything about his physical characteristics that she noticed she testified that "he had some teeth missing." The prosecutor requested that petitioner stand and open his mouth. He complied with that request. When the prosecutor asked the complaining witness whether petitioner's mouth was "that way" on the night of the robbery she testified "I don't believe he had any of these on the bottom missing. He had some on top missing."[1] The condition of petitioner's teeth is a physical characteristic which is outside the protection of the Fifth Amendment. Petitioner was not denied his constitutional rights against self-incrimination when he responded to the request

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1. During the punishment phase of the trial petitioner testified that he had been assaulted by fellow prisoners in the jail and, among other injuries, some of his teeth were knocked out.

by the prosecutor to open his mouth in order that the condition of his teeth could be observed by the complaining witness.

Petitioner's challenge to the pretrial identification is based upon his contention that the complaining witness had identified him on the night of the arrest when he was in the lobby of his motel and the complaining witness observed him from outside through the display window. At that time the only persons in the lobby of the motel other than petitioner, a white man, were two police officers and a black porter. He contends that under those circusmtances the complaining witness had no alternative but to identify him as the assailant. However, when petitioner first approached the complaining witness on the night of the assault he was very near a street light and the complaining witness testified that she had a clear view of him. Also the night was moonlit. Further, petitioner struck up a conversation with her and walked with her for approximately five minutes. They separated and later he again approached petitioner. On those two occasions when petitioner was in contact with the complaining witness the complaining witness had ample opportunity to observe petitioner, his physical characteristics and appearance, and his clothing. She had given a full and complete description of petitioner's physical appearance and clothing to the police officers who arrested petitioner as a suspect. Her "in court" identification of petitioner was clear, positive, and unchallenged.

The first inquiry the court should make is whether the identification procedure was unnecessarily suggestive. A finding of impermissible suggestiveness raises concern over the reliability of the identification and triggers close scrutiny to determine whether the procedure created the substantial risk of misidentification. However, the linchpin of due process analysis is the the reliability of the in court identification. Assume, without finding, that the identification procedures on the night of the arrest, were "suggestive." As noted above the "in court" identification was clear, positive and unchallenged. The "in court" identification far more than overbalances any corrupting influence of the identification in the motel soon after the incident which might be conducive to irreparable mistaken identification.

None of the challenges advanced by petitioner entitle him to habeas relief. I recommend that the application for writ of habeas corpus be denied.

The Clerk is directed to file this Report and Recommendation and to send a copy of it to petitioner and a copy to the attorney for respondent. Any party may object to the proposed findings and to the recommendation within ten days after having been served with a copy hereof. Such party shall file with the Clerk of the Court, and serve on the Magistrate and on all parties, written objections which shall specifically identify the portions of the findings, recommendation, or report to which objection is made and shall set out fully the basis for each such objection. Failure to timely file written objections to the proposed findings and recommendation contained in this report shall bar an aggrieved party from attacking the factual findings on appeal. *See Nettles v. Wainwright*, 677 F2d 404, 408 (5th Cir. 1982)(en banc).

Recommended this 23rd day of April, 1984.

/s/ Bill H. Brister
UNITED STATES MAGISTRATE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

GREGORY ALLEN PETTY,	§	
	§	
PETITIONER	§	
	§	
VS.	§	**CA5-84-34**
	§	
D.V. McKASKLE, DIRECTOR, TEXAS DEPT. OF CORRECTIONS	§	
	§	
RESPONDENT	§	

ORDER DENYING APPLICATION FOR WRIT OF HABEAS CORPUS

This Court has considered the Report and Recommendation filed by the United States Magistrate on April 24, 1984. The Court has independently reviewed the pleadings, the statement of facts of an the trial, the briefs on appeal, the appellate opinion, and the transcript of all state court proceedings.

The findings of the Magistrate are supported by the record and this Court adopts those findings and the recommendation to deny the application for writ of habeas corpus.

LET JUDGMENT BE ENTERED ACCORDINGLY.

The Clerk is directed to file this order and to mail a copy of the order and of the Report and Recommendation of the United States Magistrate to petitioner, a copy of each to the attorneys for respondent, and a copy of each to the presiding judge of the 99th District Court of Lubbock County, Texas.

Entered this 14th day of May, 1984.

/s/ Halbert O. Woodward

UNITED STATES DISTRICT JUDGE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

GREGORY ALLEN PETTY,	§	
	§	
PETITIONER	§	
	§	
VS.	§	CA5-84-34
	§	
D.V. McKASKLE,	§	
DIRECTOR,	§	
TEXAS DEPT. OF	§	
CORRECTIONS	§	
	§	
RESPONDENT	§	

JUDGMENT

The Court has this day entered order entitled Order Denying Application for Writ of Habeas Corpus.

It is, therefore, ORDERED, ADJUDGED and DECREED that the application for writ of habeas corpus filed by Gregory Allen Petty be, and it is hereby, denied and dismissed.

The Clerk is directed to file this judgment and to mail a copy of the judgment to petitioner, a copy to the attorneys for respondent, and a copy to the presiding judge of the 99thd District Corut of Lubbock County, Texas.

Entered this 14th day of May, 1984.

/s/ Halbert O. Woodward
UNITED STATES DISTRICT JUDGE

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Gregory Allen Petty,
Petitioner-Appellant,

V.

No. 84-1488
Summary Calendar

O.L. McCotter, Director, Texas Department of Corrections,
Respondent-Appellee.

OPINION

Filed January 3, 1986

Before: Alvin B. Rubin, Sam D. Johnson, and Edith H. Jones, Circuit Judges.

Opinion by Judge Alvin B. Rubin

Appeal from the United States District Court for the Northern District of Texas Halbert O. Woodward, Chief District Judge, Presiding

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SUMMARY

Criminal Procedure

Appeal from dismissal of petition for writ of habeas corpus. Reversed and remanded.

Petty seeks a writ of habeas corpus on the ground that his trial counsel was ineffective. His claim was dismissed by the district court without an evidentiary hearing because he failed to allege that he had suffered any specific prejudice as a result of his counsel's actions. He now contends his counsel's inadequate preparation and her failure to raise an insanity defense constituted ineffective assistance.

[1] Petty's contention that his counsel's failure to investigate a potential defense to his identification as the perpetrator of the crime constituted ineffective assistance fails. It does not

reflect the necessary prejudice, that there is a reasonable probability that but for counsel's unprofessional errors the result of the proceeding would have been different. [2] Petty's identification was firmly established by other evidence not undermined by his potential defense.

[3] If Petty had rasied the insanity defense issue in district court, he would have been entitled to an evidentiary hearing to determine whether counsel's failure to investigate his mental capacity resulted in the failure to present a valid defense of insanity. [4] Petty, as a pro se petitioner, should be given an opportunity to amend his pleading in district court to assert what he now contends. [5] Although Petty raised his claim of ineffective assistance of counsel in state court and exhausted his state remedies, he did not htere assert the factual basis of his present claim that counsel failed to investigate a defense basis of his present claim that counsel failed to investigate a defense of insanity. When the claim presented in federal court is based on significantly different underlying facts, state remedies have not been exhausted and on remand the state may raise that defense in an amended answer to Petty's amended pleadings.

OPINION

ALVIN B. RUBIN, Circuit Judge:

Gregory Allen Petty, a state prisoner convicted of aggravated robbery, seeks a writ of habeas corpus on the ground that his counsel at the trial was ineffective. Without an evidentiary hearing, the district court dismissed this claim because Petty failed to allege that he suffered any specific prejudice as a result of his counsel's actions. On appeal, Petty sets out facts that suggest possible prejudice. Although we are unable to consider these allegations, because they are made for the first time on appeal, we reverse and remand this case to the district court, with instructions that Petty be permitted to amend his complaint to allege the facts now asserted.

Petty contends that he received ineffective assistance of counsel both because of his lawyer's inadequate preparation an because of her failure to assert the defense of insanity. We consider these contentions separately.

I.

Petty asserts that his trial counsel conferred with him only twice before trial, obtained only a brief knowledge of the case, never discussed possible defenses with him, failed to interview prospective defense witnesses, and was entirely unprepared for trial because she assumed that he would plead guilty.

In his pro se appellate brief, Petty for the first time attempts to specify how he was prejudiced by these actions. At trial, the complaining witness testified that Petty approached her on the street, held a pocket knife to her throat and, failing in an attempt to rape her, grabbed her purse and ran away. The victim went to the nearby home of a friend and called the police, giving a description of her assailant. After about twenty minutes, the police told her that they had found a suspect. The victim was taken to a motel near the scene of the incident where, from the police car, she identified Petty standing in the lobby, twelve to fourteen feet away, with two policemen and a motel clerk. She told the police that he looked like her attacker, and "if he has any teeth missing there would be no doubt."

In court, Petty stood and opened his mouth to show a number of missing teeth. Asked if that was how his mouth looked during the robbery, the victim replied "I don't believe he had any of these on the bottom missing. He had some on top missing." Petty asserts that his teeth were not missing until after his arrest, when they were later knocked out as a result of two assaults upon him in the county jail. Petty thus asserts, for the first time on appeal, that counsel failed to investigate this defense by interviewing potential witnesses, or by seeking out medical records and disciplinary reports, that would confirm that his teeth were knocked out after his arrest.

[1] This contention is without merit, for is does not reflect prejudice of the degree required by *Strickland v. Washington*.[1] In order to prevail on a claim of ineffective assistance of counsel, the defendant must show "that there is a reasonable probability that, but for counsel's unprofessional

1. _____U.S._____, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

errors, the result of the proceeding would have been different.'[2] The errors of counsel must call into question the fundamental fairness of the conviction.

[2] In this case, the identification of Petty was firmly established by other evidence. The victim testified that she saw him clearly when she spoke with him directly under a street light and walked alongside him for five or six minutes. Her identification of him was certain and unqualified. His clothing fit the description she had given the police, and her purse was found in his motel room. Even though Petty may have suffered later injuries to his teeth, he admitted that his teeth had been badly decayed and might have appeared to be missing. The arresting officer testified at trial that Petty was missing a tooth at the time of his arrest. In the face of this evidence, it is not probable that testimony about Petty losing one or more of his teeth while in custody would have led to a different verdict.

II.

[3] Also for the first time on appeal, Petty asserts that his trial attorney failed to investigate the possible defense of insanity. He claims, among other grounds, that he has been committed to mental institutions on three separate occasions and has undergone outpatient psychiatric care for a number of years. He asserts that he was denied the opportunity to present evidence bearing on his degree of responsibility at the time of the offense and at the time of trial. No evidentiary hearing was held in state court. Had Petty raised this issue in the district court, he would have been entitled to an evidentiary hearing to determine whether counsel's failure to investigate his mental capacity resulted in the failure to present a valid defense of insanity.[3]

[4] We are a court of error and ordinarily do not consider issues raised for the first time on appeal. The fact that Petty has now made these allegations, however, indicates that he would raise them in the district court if he were given the

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2. *Id.* at _____, 104 S.Ct. at 2068, 80 L.Ed.2d at 697.

3. *See Johnson v. Estelle*, 704 F.2d 232, 239-40 (5th Cir. 1983), *cert. denied*, 104 S.Ct. 1006 (1984); *Clark v. Blackburn*, 619 F.2d 431 (5th Cir. 1980).

opportunity to do so. Therefore, even if a pro se petitioner is required to allege the specific prejudice that he must eventually prove. Petty should be given an opportunity to amend his pleadings in order to assert what he now contends.

[5] Although Petty raised his claim of ineffective assistance of counsel in state court and exhausted his state remedies, he did not there assert the factual basis of his present claim that counsel failed to investigate a defense of insanity. We have held that, when the claim presented in federal court is based on significantly different underlying facts, state remedies have not been exhauseted. *Burns v. Estelle*, 695 F.2d 847, 849-50 (5th Cir. 1983). If Petty amends his pleadings on remand, then the state, if it so chooses, should be permitted to raise this defense by amending its answer. Any dismissal that results from failure to exhaust state remedies would be without prejudice, leaving Petty free to return to federal court after seeking relief from the state. In the interests of efficiency and finality, therefore, the state may prefer to waive this defense.

The most efficient resolution of this appeal would be to remand for an evidentiary hearing without the formality of requiring that pleadings be amended to allege what is already set out in the briefs before this court. *Strickland* requires that prejudice be proved, not pleaded. To remand for a hearing, however, would prevent the state from asserting the defense of nonexhaustion of state remedies because the underlying facts are different. In the future, the hearing of habeas corpus matters may be facilitated if the district courts modify the standard forms provided to pro se petitioners to require that, when the petitioner alleges ineffectiveness of counsel, he also describe the prejudice allegedly suffered. This would then enable the state directly to raise, or to waive, the petitioner's failure to exhaust state remedies.

For the reasons given, the dismissal is REVERSED, and the case is REMANDED with instructions to the district court to permit Pety to amend his complaint, to permit the state to amend its answer, and then to conduct such further proceedings as may be appropriate and consistent with this opinion.

APPENDIX G

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 84-1488

GREGORY ALLEN PETTY,
Petitioner-Appellant

versus

O.L. McCOTTER, Director,
Texas Departmetn of Corrections,
Respondent-Appellee.

Appeal from the United States District Court for the
Northern District of Texas

ON SUGGESTION FOR REHEARING EN BANC

(Opinion January 3, 5 Cir., 1986, _____F.2d_____)
(March 4, 1986)

Before RUBIN, JOHNSON and JONES, Circuit Judges.

PER CURIAM:

(✓) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federa Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Alvin B. Rubin

United States Circuit Judge

Supreme Court, U.S.
FILED
MAY 19 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1656

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

O. L. MCCOTTER, DIRECTOR
TEXAS DEPARTMENT OF CORRECTIONS,
Petitioner,

v.

GREGORY ALLEN PETTY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

JOHN R. BREIHAN
BAKER & BOTTS
1410 United Bank Tower
400 West 15th Street
Austin, Texas 78701
(512) 478-1234
Attorney for Respondent

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

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O. L. MCCOTTER, DIRECTOR
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Petitioner,

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Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioner's statement of the case is substantially correct in stating the nature of the case with the following addition:

1. On March 7, 1984, Gregory Allen Petty filed his Petition for a Writ of Habeas Corpus on a form such as is annexed by Rule 2(c) to the Rules Governing Section 2254 Cases.

SUMMARY OF ARGUMENT

In his habeas corpus petition, Petty's allegation of ineffective assistance of counsel was not supported by a pleading of "prejudice." Instead of giving notice to Petty of the defect, with an opportunity for Petty to amend, the district court dismissed Petty's petition. The Fifth Circuit's decision to remand, which provides an opportunity for Petty to amend his petition, is supported by the general rule that dismissals based on defects in pleading should not be made on the merits. Hence, the Fifth Circuit's decision is appropriate and the State of Texas' Petition for Writ of Certiorari should be denied.

REASONS FOR DENYING THE WRIT

I. Dismissals Due to Defects in Pleading Are Not Normally Made on the Merits.

The first paragraph of the Fifth Circuit's opinion explained that "the district court dismissed this claim because Petty failed to allege that he suffered any specific prejudice as a result of his counsel's actions." *Petty v. McCotter*, 779 F.2d 299, 300 (5th Cir. 1986). The Fifth Circuit agreed that Petty's petition was defectively pled, and therefore remanded Petty's habeas action with instructions to the district court to allow Petty to amend his petition to plead "prejudice."

The Fifth Circuit's decision was necessary because the district court's judgment "denied and dismissed" Petty's petition with no opportunity to amend. *See* State's Appendix F. If the district court's judgment were to stand as written, then the State of Texas would take the position, as it has in its Petition for Writ of Certiorari, that the district court's judgment was "made on the merits." In the future, as Petty sought to properly plead "prejudice" in accordance with *Hill v. Lockhart*, —— U.S. ——, 106 S.Ct. 366 (1985), Petty would face the State's defense of abuse of the writ under Rule 9(b), 28 U.S.C. fol. § 2254.

Such a result is not in keeping with the rule that a dismissal based upon a defect in pleading, such as a *Hill*-type defect, should not be made on the merits. As this Court wrote in *Costello v. United States*, 365 U.S. 265, 286 (1961):

> If the first suit was dismissed for defect of the pleading, or parties, or a misconception of the form of proceeding, or was disposed of on any ground which did not go to the merits of the action, the judgment rendered should not bar another suit.

Further, a dismissal with prejudice for failure to state a claim is inappropriate unless it appears "beyond doubt" that no set of facts can be proven to support the claim. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). The Fifth Circuit was not convinced that it was "beyond doubt" that Petty could prove facts to support his claim, nor does the district court's judgment so state. Therefore, the Fifth Circuit's decision to remand the case with an opportunity for Petty to amend is entirely appropriate.

II. Petty's Pleading Defect was In Part Due To His Use of the Form Annexed to the Rules Governing Section 2254 Cases.

In its opinion the Fifth Circuit recommended that district courts modify the standard forms provided to *pro se* habeas petitioners to require them to specifically allege prejudice when pleading ineffectiveness of counsel. *Petty v. McCotter*, *supra*, at 302. Presently, as well as at the time Petty filed his petition on March 7, 1984, the form annexed to the Rules Governing Section 2254 Cases instructs *pro se* habeas petitioners as follows:

> State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the *facts* supporting each ground.

There is no mention in the form that "prejudice" should be pled by *pro se* habeas petitioners. In fact, there is no suggestion that a *pro se* habeas petitioner must allege

any additional facts in an ineffective assistance case other than the facts that would be sufficient to state any of the other nine constitutional complaints listed on the form.

Pro se petitions, such as Petty's petition, should be held "to less stringent standards than formal pleadings drafted by lawyers." *Haines v. Kerner*, 404 U.S. 520 (1972). This should be especially true when the *pro se* petitioner has pled in accordance with a form provided for his use by federal rules. For this reason as well, the Fifth Circuit remanded with an opportunity for Petty to amend his petition. Any other resolution of this case would allow the trial court's judgment "on the merits" to stand, thereby prejudicing Petty's future attempts to replead in accordance with *Hill* and *Strickland v. Washington*, 466 U.S. 668 (1984).

III. The Fifth Circuit's Opinion Is Not Inconsistent with *Hill v. Lockhart*.

To the contrary of the State of Texas' argument that the Fifth Circuit's opinion conflicts with *Hill*, the Fifth Circuit actually requires Petty to amend his petition to plead prejudice pursuant to *Hill*. The Fifth Circuit required such an amendment despite its observation that "the most efficient resolution of this appeal would be to remand for an evidentiary hearing without the formality of requiring that pleadings be amended to allege what is already set out in the briefs before this Court." *Petty v. McCotter*, *supra*, at 302.

IV. The Fifth Circuit's Review of Matters Outside the Record Did Not Affect Its Opinion.

In the first paragraph of its opinion, the Fifth Circuit recognized that it could not consider the many facts that suggest possible prejudice which were set out by Petty for the first time on appeal. *Petty v. McCotter*, *supra*, at 299. Though the Fifth Circuit did discuss and

comment upon certain of those facts in its opinion, the facts which Petty raised for the first time upon appeal play no necessary part in the decision to remand. The important issue is not whether the facts at this time are within or without the record. The important issue at this point in time is simply whether the district court's dismissal for a defect in pleading should have been made on the merits.

The district court had procedures available to it to bring the pleading defect to the attention of a *pro se* habeas petitioner such as Petty. The Rules Governing Section 2254 Cases provide a procedure for which an insufficient petition should be returned to the petitioner "together with a statement of the reason for its return." Rule 2(e), 28 U.S.C. fol. 2254. This procedure was not followed by the clerk of the district court, nor did the district judge direct the clerk to follow such a procedure. Instead, the district court ordered the State to respond under Rule 4, 28 U.S.C. fol. 2254.

Rule 4, 28 U.S.C. fol. 2254 provides for summary dismissal of petitions when it "plainly appears from the face of the petition . . . that the petitioner is not entitled to relief." When summary dismissal is appropriate, the Fifth Circuit requires specific notice and a reasonable opportunity for the habeas petitioner to respond. *Norman v. McCotter*, 765 F.2d 504 (1985). Either of these steps would have brought the pleading defect to Petty's attention at a time when he could have properly amended his petition. Because neither step was taken, the only chance Petty had to learn of the pleading defect prior to the Fifth Circuit's opinion was the magistrate's Report and Recommendation. *See*, State's Appendix C. Yet by the time the magistrate's report was issued, Petty's petition had already passed the summary dismissal stage at which a layman, especially a *pro se* habeas petitioner, would expect to have been advised of a pleading defect. The Fifth Circuit's decision to remand

is well founded on these facts and does not rely upon facts outside the record for its validity.

CONCLUSION

Petty's habeas petition was found to be defectively pled by both the district court and the Fifth Circuit. Petty failed to follow the specific pleading rule of *Hill* and *Strickland*. However, his pleadings followed the instruction of the form he was provided. To dismiss his petition on the merits is overly harsh under the circumstances. Such a dismissal would operate, through no fault of Petty, to create another State defense to his habeas action. By remanding with instructions to allow amendment, the Fifth Circuit took the step that should have been taken by the district court two years ago. Therefore, Respondent prays that the State of Texas' Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit be denied in all respects.

Respectfully submitted,

JOHN R. BREIHAN
BAKER & BOTTS
1410 United Bank Tower
400 West 15th Street
Austin, Texas 78701
(512) 478-1234
Attorney for Respondent

NO. 85-1656

Supreme Court, U.S.
FILED
AUG 28 1986
JOSEPH F. SPANIOL, JR.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

O.L. McCOTTER, DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,
Petitioner,

VS.

GREGORY ALLEN PETTY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOINT APPENDIX

WILLIAM C. ZAPALAC
CHARLES A. PALMER*
Assistant Attorney General
P.O. Box 12548
Capitol Station
Austin, Texas 78711
Telephone: (512) 463-2080
Counsel for Petitioner

JOHN R. BREIHAN
LARRY F. YORK*
BAKER & BOTTS
1410 United Bank Tower
400 West 15th Street
Austin, Texas 78701
Telephone: (512) 478-1234
Counsel for Respondent

*Counsel of Record

PETITION FOR CERTIORARI FILED APRIL 3, 1986
CERTIORARI GRANTED JUNE 30, 1986

31pp

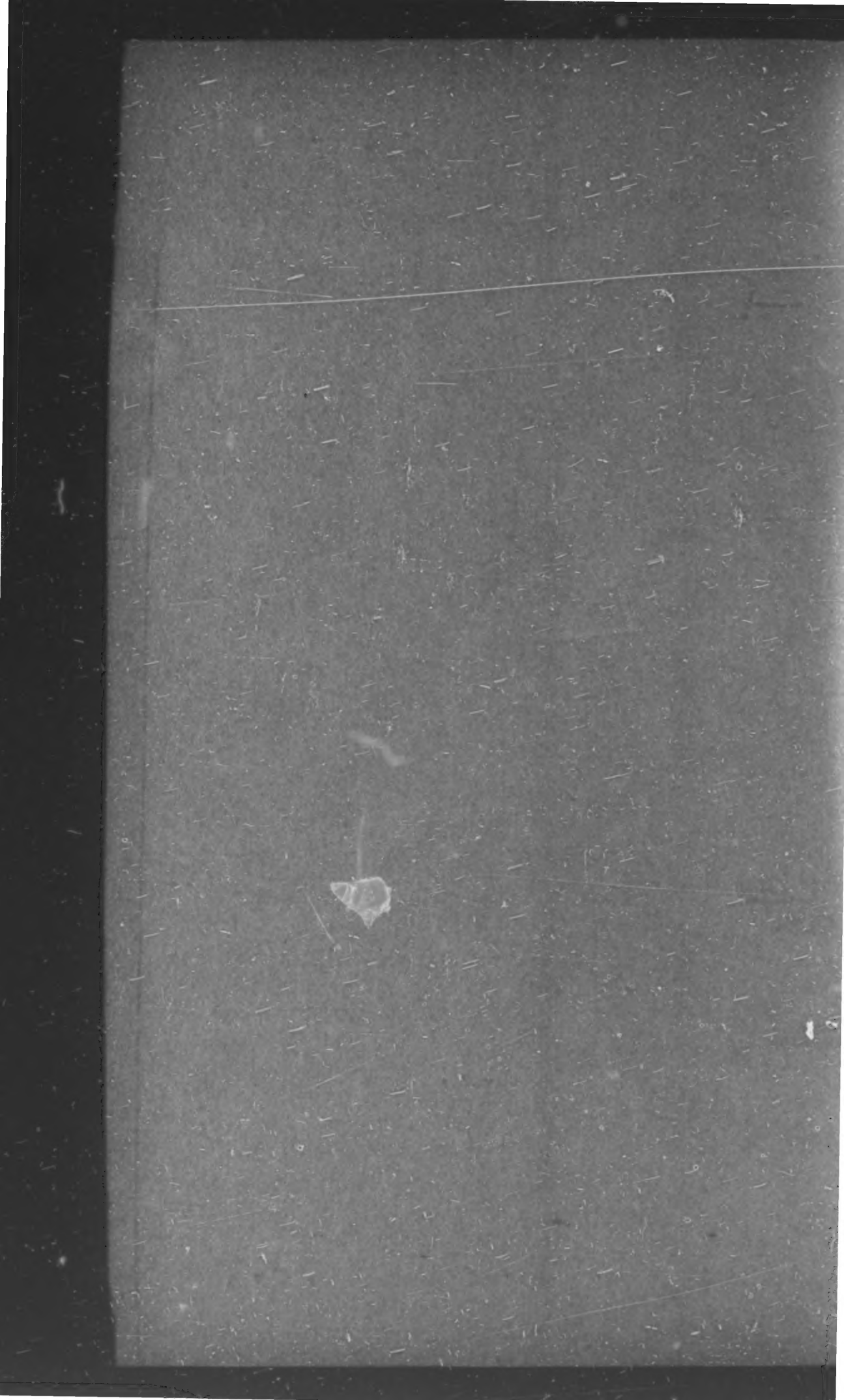


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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

GREGORY ALLEN PETTY, *Petitioner*	§	
V.	§	CIVIL ACTION NO. CA-5-84-034
D.V. McKASKLE, Acting Director, Texas Department of Corrections, *Respondent*	§	

DOCKET ENTRIES

3/7/84	Filed order permitting proceeding in the district court in forma pauperis
	Filed petition for a writ of heabeas corpus by a person in state custody
	Filed order to show cause, notice and instructions to parties
4/11/84	Filed respondent's answer and supporting brief
4/13/84	Filed state court records (A thru H)
4/19/84	Filed state court record (I)
4/24/84	Filed U.S. Magistrate's report and recommendation recommending that petitioner's application for WHC be denied.
5/14/84	Filed order denying application for writ of habeas corpus
	Filed judgment dismissing the application for writ of habeas corpus

5/24/84	Filed notice of appeal
6/4/84	Filed certificate denying certificate of probable cause
9/27/84	Filed certified copy of order from Fifth Circuit granting Petitioner's application for a certificate of probable cause

NO. 84-1488

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

GREGORY ALLEN PETTY,
Petitioner-Appellant,

v.

O.L. McCOTTER, DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,
Respondent—Appellee.

DOCKET ENTRIES

7/5/84	Minute Entry—Notice of appeal being treated as CPC per FRAP RULE 22(b) filed
9/19/84	Order granting CPC & IFP (WG) filed
11/8/84	Brief for Appellant filed
1/9/85	Brief for Appellee filed
1/18/85	Order Appointing Counsel filed
7/9/85	Supplemental Brief for Appellant filed
9/19/85	Supplemental Brief for Appellee filed
11/4/85	Reply Brief for Appellant filed
1/3/86	Opinion Rendered
2/14/86	Petition for Rehearing filed (Appellee)
3/4/86	Order Denying Rehearing
3/11/86	Stay of Mandate (Appellee)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

PETITION FOR A WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

Gregory Allen Petty #296595	Texas Department of Corrections
PETITIONER (Full name and prison number of petitioner)	PLACE OF CONFINEMENT

VS.

D.V. McKaskle	CA-5-84-034
RESPONDENT (Name of Warden, Superintendent, Jailor, or authorized person having custody of petitioner)	CASE NUMBER (To be supplied by the Clerk of the District Court)

and

THE ATTORNEY GENERAL OF THE STATE OF _____ ADDITIONAL RESPONDENT

(If petitioner is attacking a judgment which imposed a sentence to be served in the *future*, petitioner must fill in the name of the state where the judgment was entered. If the petitioner has a sentence to be served in the *future* under a federal judgment which he wishes to attack, he should file a motion under 28 U.S.C. §2255, in the federal court which entered the judgment.)

INSTRUCTIONS - READ CAREFULLY

(1) This petition must be legibly handwritten or typewritten, and signed by the petitioner under penalty of perjury. Any false statement of a material fact may serve as the basis for prosecution and conviction for perjury. All questions must be answered concisely in the proper space on the form.

(2) Additional pages are not permitted except with respect to the *facts* which you rely upon to support your grounds for relief. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.

(3) Upon receipt of a fee of $5.00 your petition will be filed if it is in proper order.

(4) If you do not have the necessary filing fee, you may request permission to proceed *in forma pauperis*, in which event you must execute the declaration on the last page, setting forth information establishing your inability to prepay the fees and costs or give security therefor. If you wish to proceed *in forma pauperis*, you must have amount of money and securities on deposit to your credit in any account in the institution. If your prison account exceeds $50.00, you must pay the filing fee as required by the rule of the district court.

(5) Only judgments entered by one court may be challenged in a single petition. If you seek to challenge judgments entered by different courts either in the same state or in different states, you must file separate petitions as to each court.

(6) Your attention is directed to the fact that you must include all grounds for relief and all facts supporting such grounds for relief in the petition you file seeking relief from any judgment of conviction.

(7) When the petition is fully completed, *the original and two copies* must be mailed to the Clerk of the United States District Court for the Northern District of Texas at the appropriate division office whose address is:

DALLAS DIVISION
Room 15C22
1100 Commerce St.
Dallas, Tx 75242

FORT WORTH DIVISION
202 U.S. Courthouse
Fort Worth, Tx 76102

LUBBOCK DIVISION
Room C221
1205 Texas Ave.
Lubbock, Tx 79401

AMARILLO DIVISION
P.O. Box F-13240
Amarillo, Tx 79189

ABILENE DIVISION
P.O. Box 1218
Abilene, Tx 79604

SAN ANGELO DIVISION
201 Federal Building
33 E. Twohig
San Angelo, Tx 79603

WICHITA FALLS DIVISION
P.O. Box 1234
Wichita Falls, Tx 76307

(8) Petitions which do not conform to these instructions will be returned with a notation as to the deficiency.

PETITION

1. Name and location of court which entered the judgment of conviction under attack:

   The 99th Criminal District Court of and for Lubbock, County, Texas

2. Date of judgment of conviction: September 6, 1979

3. Length of sentence: Fifty (50) Years

4 Nature of offense involved (all counts):
Aggravated Robbery, (One Count)

5. What was your plea: (Check one)

   (a) Not Guilty (X) (b) Guilty ( ) (c) Nolo contendere ( )

If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details:

_____

_____

_____

_____

6. Kind of trial: (Check one)

   (a) Jury (X) (b) Judge only ( )

7. Did you testify at the trial?

   Yes (X) No ( ) Sentencing Only

8. Did you appeal from the judgment of conviction?

   Yes (X) No ( )

9. If you did appeal, answer the following:
   (a) Name of Court: The Court of Criminal Appeals Austin, Texas

   (b) Result: Affirmed this conviction

   (c) Date of result: April 27, 1983 Cause Number 64,750

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal?

    Yes (X) No ( )

11. If your answer to 10 was "yes", give the following information:

    (a) (1) Name of court: The 99th Criminal District Court of Lubbock County

(2) Nature of proceeding: Writ of Habeas Corpus under article 11.07 V.A.C.C.P.

(3) Grounds raised: Denied effective assistance of Counsel was ground of error one. A fundamentally defective indictment was ground of error two.

(4) D you receive an evidentiary hearing on your petition, application or motion?

Yes ( ) No (X)

(5) Result: Denied without a hearing of any kind.

(6) Date of result: Around June or July of 1983.

(b) As to any second petition, application or motion give the same information:

(1) Name of court: Texas Court of Criminal Appeals

(2) Nature of proceeding: Writ of Habeas Corpus under article 11.07 V.A.C.C.P.

(3) Grounds raised: Denied effective assistance of Counsel was ground of error one. A fundalmentally defective indictment was ground of error two.

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes ( ) No (X)

(5) Result: All matters was denied without written notice of any kind.

(6) Date of result: October 5, 1983

(c) As to any third petition, application or motion, give the same information:

(1) Name of court: _____

(2) Nature of proceeding:_____

_____

(3) Grounds raised: _____

_____

_____

_____

_____

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes ( ) No ( )

(5) Result:_____.

(6) Date of result: _____

(d) Did you appeal to the highest state court having jurisdiction the result of action taken on any petition, application or motion?

(1) First petition, etc. Yes (X) No ( )

(2) Second petition, etc. Yes (X) No ( )

(3) Third petition, etc. Yes (X) No ( )

(e) If you did *not* appeal from the adverse action on any petition, application or motion, explain briefly why you did not:

_____

_____

_____

12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the *facts*

supporting each ground. If necessary, you may attach pages stating additional grounds and *facts* supporting same.

> Caution: In order to proceed in the federal court, you must ordinarily first exhaust your state court remedies as to each ground on which you request action by the federal court. If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed if you have exhausted your state court remedies with respect to them. However, *you should raise in this petition all available grounds* (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

DO NOT CHECK ANY OF THESE LISTED GROUNDS. If you select one or more of these grounds for relief, you must allege facts. The petition will be returned to you if you merely check (a) through (j) or any one of these grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.

(b) Conviction obtained by use of coerced confession.

(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.

(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.

(e) Conviction obtained by a violation of the privilege against self-incrimination.

(f) Conviction obtained by the unconstitutional failure of the

prosecution to disclose to the defendant evidence favorable to the defendant.

(g) Conviction obtained by a violation of the protection against double jeopardy.

(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.

(i) Denial of effective assistance of counsel.

(j) Denial of right to appeal.

A. Ground one: Denied effective assistance of Counsel.

Supporing FACTS (tell your story *briefly* without citing cases or law):

The fact of this case vividly illustrate legal representation utterly failing to meet minimal constitutional standards. Viewed most charitably the performance of my court-appointed attorney was at best perfuncorty. As a preliminary matter it should be plainly stated that explanation for the substandard performance of Counsel in my case; is self-evident from the record believing me to be guilty of the offense charge, she naturally assumed that I would eventually enter a plea of guilty to the indictment, thereby the obviating the necessity for a jury trial and the investigation and preparation necessary incident to it. When I persisted in denying my guilt and demanding a trial, Counsel was (so to speak) caught flatfooted and was therefore compelled to defend the accusation in a state of virtually total unpreparedness. Failure to interview prospective defense witnesses prior to trial all of these circumstances explain what happened as clearly and as persuasively as if Counsel had candidly admitted that she did not feel it necessary to devote to much time to the case of a man she believed to be obviously guilty.

Counsel only conferred with me one time before trial. This interview was only to receive a brief knowledge of the case, and too deliver the Assistant District Attorney's plea bargain deal. This discussion was directed toward me making a possible plea

of guilty to the charge and further asking me, to consider the deal proposed by the State. Never was there a discussion of a possible defense and the address of my witnesses mentioned by Counsel.

Counsel negleted to explain the full legabity of the offense for which I was charged and indicted. Obviously the adequacy of a court-appointed attorney consultations with there client prior to trial cannot be evaluated simply in terms of the number of times or the length of there discussions. On the other hand, where (as here) a criminal defendant is facing the possibility of fifty (50) years which I ultimately received, and persistently maintains my innocence, there must certainly be a corresponding greater obigation on the part of an attorney in preparing for trial to assure thereself that they are thoroughly fimiliar both with the facts of the case from the State's perspective and the defendants version of those facts. Certainly, an attorney cannot render reasonably effective assistance unless they have acquated themself with the law and facts of the case.

B. Ground two: Fundalmentally Defective Indictment

Supporting FACTS (tell your story *briefly* without citing cases or law):

The indictment fails to allege the owner of the United States Currency. The indictment also fails to allege that the complainant, had a greater right to the currency than me, thereby it fails to allege and charge on offense upon which a conviction could be had, because it is fundalmentally defective on its face.

C. Ground three: The evidence is insufficient to support a conviction of aggravated robbery since the State failed to prove that I used or exibited a deadly weapon during the commission of the robbery.

Supporting FACTS (tell your story *briefly* without citing cases or law):

Testimony presented at trial shows no evidence of serious bodily injury to anyone or of the use or exibition of a deadly weapon during the commission of the robbery. The victim

admitted that the knife used in the initial confrontation had already been returned to my pocket prior to the taking of her purse and that the knife was never used as a threat during or for the purpose of the theft. The victim also admitted that she was not injured during the course of events that evening. She further testified that she believed that I was attempting to rape her. There is no evidence that the victim feared that she would be robbed. In fact, on numerous occasions, the victim testifed that she at no time felt threatened by or frightened of me until the incident was completed.

D. Ground four: The State failed to prove beyound a reasonable doubt that the knife used in the commission of the robbery was a deadly weapon.

Supporting FACTS (tell your story *briefly* without citing cases or law):

The victim testified that the knife was a regular size pocketknife with a blade approximately two and one-half to three inches long. She testified that the blade and tip was dull and that she suffered no cuts from the knife. The victim was a cook by trade and had some additional knoweldge as to the condition of knives. Testimony at trial indicates that the knife was not used as a deadly weapon. The record reveals that, at the time of the theft, the knife was never used nor displayed at a threat to procure the property of the victim. In this case the victim testified that I displayed a knife and threatened to harm her if she did not cooperate with my demand to remove her clothes. It was at this time that the victim determined that the blade and tip of the knife were to dull to do any bodily injury to her. When the victim was asked to remove her clothing, the knife was at most times visible to her; however, the victim admitted that, upon her refusal to remove her clothing, I folded up the knife with my hand, returned it to my pocket and took her purse which had fallen to the street during the scuffle.

E. Ground Five: Notwithstanding Defense Counsel's failure to object, the Honorable Trial Court errored in not admonishing me or otherwise obtaining a waiver of the privilege against self incrimination prior to requesting me to stand and further identify myself by opening my mouth during the trial.

Supporting FACTS

I was forced to stand and open my mouth for the view of the victim and the jury in order that the victim could make a positive in-court identification. There is no indication in the record that I was informed of my right against self incrimination, nor is there any indication that I waived my right knowingly and voluntarily. It cannot be presumed that I waived my privilege against incrimination without record of a free and voluntary waiver.

F. Ground Six: The Honorable Trial Court erred in admitting testimonial evidence reporting an "Impermissibly Suggestive" pretrial identification of me.

Supporing FACTS

The trial record reflects that the victim knew that she was going to the motel lobby to look at a suspect that the police had found. The indentification was made by the victim from a police car while I was standing inside the motel lobby. The reason that the identification was "impermissibly suggestive" is to the fact tht inside the lobby at the time of identification were two uniformed policemen, a white male (myself), and a black motel porter. Furthermore, the record reflects that the victim could not have been completely sure without determining if any teeth were missing from my mouth. This determination was never done at the pretrial identification by the victim. The fact remains that an identification was made under circumstances that lent themselves to not only suggestiveness, but also to uncertainty on the part of the victim herself. It is also significant that the only identification by the victim prior to trial was at the motel.

13. If any of the grounds listed in 12A, B, C, and D were not previously presented in any other court, state or federal, state *briefly* what grounds were not so presented, and give your reasons for not presenting them:

_____

_____

_____

_____

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack?

    Yes ( ) No (X)

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

    (a) At preliminary hearing: This is unknow by me.

    (b) At arraignment and plea: Wanda Wray
    812 Main Lubbock, Texas 79401

    (c) At trial: Wand a Wray
    812 Main Lubbock, Texas 79401

    (d) At sentencing: Wanda Wray
    812 Main Lubbock, Texas 79401

    (e) On appeal: George L. Thompson
    P.O. Box 10113 Lubbock, Texas 79408

    (f) In any post-conviction proceeding: _____

    _____

    _____

    (g) On appeal from any adverse ruling in a post conviction proceeding: _____

    _____

    _____

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?

    Yes ( ) No (X)

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?

Yes ( ) No (X)

(a) If so, give name and location of court which imposed sentence to be served in the future:_____

_____

_____

(b) And give date and length of sentence to be served in the future: _____

_____

(c) Have you filed, or do you comtemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?

Yes ( ) No (X)

Wherefore, petitioner prays that the Court grant petitioner relief to which he may be entitled in this proceeding.

_____

Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on Feb. 29, 1984 (date)

/s/

_____

Signature of Petitioner

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

GREGORY ALLEN PETTY,	)	
	)	
Petitioner	)	
	)	
vs.	)	No. CA-5-84-034
	)	
D.V. McKASKLE, Director	)	
Texas Dept. of Corrections,	)	
	)	
Respondent	)	

RESPONDENT'S ANSWER AND SUPPORTING BRIEF

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Respondent, and files this answer and supporting brief, and would show the court the following:

I.

On September 7, 1979, in Cause No. 19914, 99th District Court of Lubbock County, Texas, a jury found Petitioner guilty of the felony offense of aggravated robbery and assessed Petitioner's punishment at 50 years in the state penitentiary. On April 27, 1983, the Texas Court of Criminal Appeals affirmed Petitioner's conviction, and Petitioner is presently confined pursuant to that conviction.

II.

In addition to Petitioner's direct appeal, in 1983, Petitioner also filed an application for writ of habeas corpus with the convicting court complaining of this same conviction. The issues raised by Petitioner in his direct appeal and his state habeas application are similar to the issues to the issues that Petitioner now raises to this court, and Petitioner may have exhausted his state remedies.

III.

Petitioner's issues are without constitutional merit.

(1) Petitioner contends that he was denied effective assistance of counsel. Respondent denies this allegation. Petitioneralleges that counsel failed to interview prospective defense witnesses, only conferred with Petitioner one time before trial, did not discuss with Petitioner possible defenses or possible witnesses, and was totally unprepared for trial. Petitioner wasnot entitled to perfect counsel nor is counsel to be judged by hindsight. Petitioner was only entitled to counsel reasonably likely to render and rendering reasonably effective assistance, and whether Petitioner received reasonable effective assistance is determined from a review of the totality of the representation furnished. *See Baldwin v. Blackburn,* 653 F.2d 942, 946 (5th Cir. 1981); *Nelson v. Estelle,* 642 F.2d 903, 906 (5th Cir. 1981); *MacKenna v. Ellis,* 280 F.2d 592 (5th Cir. 1960). To prevail, Petitioner must also demonstrate an identifiable lapse on the part of counsel and some actual, adverse impact upon the fairness of his trial resulting from such lapse, and mere conclusory allegations are insufficient to demonstrate ineffectiveness of counsel. *See Blackledge v. Allison,* 431 U.S. 63, 75-76 (1976); *Rubio v. Estelle,* 689 F.2d 533 (5th Cir. 1982); *Sneed v. Blackburn,* 569 F.2d 854 (5th Cir. 1978); *Bryant v. Elliott,* 472 F.2d 572 (5th Cir. 1973).

Petitioner does not allege what pretrial investigation should have been conducted by counsel that was not conducted or how his defense would have been materially benefitted by any additional investigation by counsel; Petitioner does not allege what witnesses should have been interviewed by counsel that were not, does not allege what those witnesses would have testified to that would have been material to any defense of Petitioner, or that those witnesses would have in fact testified or that their testimony would have been admissible. Petitioner concedes in his petition that counsel did confer with Petitioner to receive a knowledge of the case, but Petitioner does not demonstrate how additional conferences would have benefitted counsel or any defense of Petitioner.

A review of the state records also reflect that counsel was appointed to represent Petitioner approximately two months prior to Petitioner's trial. It also appears that this same counsel had been appointed to represent Petitioner in another case in Cause No. 18594, 99th District Court, Lubbock County, Texas, on application for revocation of probation. It also appears that in Petitioner's present conviction another counsel also assisted petitioner's appointed counsel. The records reflect that Petitioner's counsel thoroughly voir dired the prospective jurors to obtain a fair and impartial jury, fully cross-examined the witnesses for the state which indicated that counsel was familiar with the facts and the law involved in this case, made reasonable objections to testimony and evidence, many of which were sustained, and made final jury argument. A review of the totality of the representation furnished to Petitioner by his counsel clearly shows that counsel loyally and competently represented Petitioner.

(2) Petitioner contends that the indictment was fundamentally defective. Respondent denies this allegation. Petitioner alleges that the indictment failed to allege "the owner of the United States currency" and also failed to allege "that the complainant had a greater right to the currency than 'Petitioner'." In his direct appeal, Petitioner complained of the indictment, but not not on these grounds. The Texas Court of Criminal Appeals found the indictment sufficient under Texas law. It was not until 1983 when Petitioner filed his application for writ of habeas corpus in state court that he raised these specific complaints to the indictment. To gain the attention of the federal court in collateral proceedings, Petitioner must demonstrate that the indictment was so defective as to deny the trial court of jurisdiction to try Petitioner. *See Branch v. Estelle*, 631 F.2d 1229, 1233 (5th Cir. 1980); *Haywood v. Wainwright*, 454 F.2d 733 (5th Cir. 1972). Petitioner's indictment tracked the state statutes involved, and conferred jurisdiction on the trial court to try Petitioner on that indictment. Secs. 29.02 and 29.03, Texas Penal Code. Not only did the indictment track the state statutes and confer jurisdiction on the trial court, the indictment also apprised Petitioner of the offense being charged, the criminal conduct he was expected to defend, and allowed Petitioner to plead jeopardy. Under these circumstances, the indictment was also sufficient under the federal constitution. *See*

Branch v. Estelle, supra. *U.S. v. Broome*, 628 F.2d 403 (5th Cri. 1980). *U.S. v. Contris*, 592 F.2d 893, 896 (5th Cir. 1979). Further, Petitioner's contention that the indictment did not allege who the owner of the currency was is without merit. The indictment specifically charged that it was "property of Edna Faye Mars, to-wit: good and lawful United States currency". Not only was that a sufficient allegation of ownership, Texas law does not require in an aggravated robbery indictment that it allege ownership of the property. *See Ex Parte McWilliams*, 634 S.W.2d 815 (Tex.Crim.App. 1982), *cert. denied* 103 S. Ct. 447, *Brown v. State*, 535 S.W.2d 640 (Tex.Crim.App. 1976); *Davis v. State*, 532 S.W.2d 626 (Tex.Crim.App. 1976). Nether is there any requirement under Texas law that the indictment allege that the complaintant had a greater right to the currency than did Petitioner. In an aggravated robbery indictment, it is not necessary that the separate elements of theft be alleged. However, those elements were fully explained and defined in the court's charge to the jury. *See Mann v. State*, 64 S.W.2d 53 (Tex.Ct.App. 1982); *Linville v. State*, 620 S.W.2d 130 (Tex.Crim.App. 1981); *Griffin v. State*, 614 S.W.2d 155 (Tex.Crim.App. 1981). Not only was the indictment not fundamentally defective under Texas law, and not only was the indictment sufficient under the federal constitution, Petitioner's admitted failure to raise these complaints to the indictment prior to or during his state trial constitutes a waiver of such complaints in these collateral federal habeas proceedings. *See Wainwright v. Sykes*, 97 S. Ct. 2497 (1977); *Rhodes v. State*, 650 S.W.2d 655, 671 (Tex.Crim.App. 1978); *Parr v. State*, 575 S.W.2d 522, 526 (Tex.Crim.App. 1978); *American Plant Food Corp. v. State*, 508 S.W.2d 598, 604 (Tex.Crim.App. 1974), appeal dismissed 419 U.S. 1098 (1974). *See* also *Santana v. State*, 658 S.W.2d 612 (Tex.Crim.App. 1983).

(3) Petitioner contends that the evidence was insufficient to prove that he used or exhibited a deadly weapon during the commission of the robbery. Respondent denies this allegation. This issue was raised by Petitioner in his direct appeal and that court, in its written opinion, found "From the manner and intent of its use as described by the complainant, the evidence is sufficient that the knife was a deadly weapon." That finding by the Texas appellate court is fully supported by the factual record, not clearly erroneous, and shall be presumed correct

in these collateral proceedings, Petitioner having demonstrated no exception to the presumption of correctness. *See* 28 U.S.C. Sec. 2254(d); *Sumner v. Mata*, 101 S. Ct. 764 (1981); *Minniefield v. Alabama*, 542 F.2d 947 (5th Cir. 1976). A deadly weapon is defined as anything that in the manner of its use or intended use is capable of causing death or serious bodily injury. Sec. 1.07(11), Texas Penal Code. The indictment so alleged, and the court so charged the jury and a review of the record in the light most favorable to the prosecution clearly domonstrates that the jury could readily have found Petitioner guilty beyond a reasonable doubt of aggravated robbery under Texas law. *Jackson v. Virginia*, 99 S. Ct. 2781 (1979).

(4) Petitioner contends that the state failed to prove beyond a reasonable doubt that the knife used in the commission of the robbery was a deadly weapon. This same issue was discussed previously in paragraph (3) above, and the discussion of the law and the facts under that prior issue also established that this issue is without merit.

(5) Petitioner contends that the trial court erred in not admonising him or obtaining a waiver of his priviledge against self-incrimination prior to having Petitioner stand and opening his mouth during his trial. Respondent denies that Petitioner's constitutional rights were violated. First Petitioner concedes that no objection was made on this bases during trial. Although Petitioner raised this issue in his direct appeal, the appellate court refused to consider the issue since no objection or request was made and therefore nothing preserved for review. Under these circumstances, this complaint is waived in these collateral proceedings, Petitioner having demonstrated no good cause from failure to object or actual prejudice resulting to him. *See Engle v. Isaac*, 102 S. Ct. 1558 (1982); *Wainwright v. Sykes*, 97 S. Ct. 2497 (1977). During Petitioner's trial, the complaintant had testified that her assailant had some teeth missing and pursuant to that testimony, Petitioner was asked to stand and open his mouth, which he did, without objection. Although the complaintant said that she did not believe he had any bottom teeth missing but had some on the top missing at the time of the robbery, stated that she did recognize Petitioner. Having Petitioner open his mouth so the complainant could observe his teeth was a physical characteristic

outside the protection of the Fifth Amendment of the federal constitution much like a handwright exemplar, a voice identification, or the body itself. *See Gilbert v. California*, 384 U.S. 757 (1966). *See* also *Moulton v. State*, 486 S.W.2d 334, 337 (Tex.Crim.App. 1971).

(5) Petitioner contends that the trial court erred in admitting testimony regarding an impermissibly suggestive pretrial identification of Petitioner. Respondent denies that Petitioner's constitutional rights were violated. This issue was raised by Petitioner in his direct appeal, but the Texas Court of Criminal Appeals refused to consider this issue because no objection on this ground of error was urged to the trial court and therefore nothing was reserved for review under Texas law. Since no objections were raised by Petitioner at trial to any testimony regarding a pretrial identification of Petitioner by the complainant and since no objection was raised by Petitioner at trial regarding the complaintant's in-court identification of Petitioner, and since Texas law required such objections to be contemporaneously made, this issue is now waived in these collateral proceedings. *See Engle v. Isaac*, supra.; *Wainwright v. Sykes*, supra. Further, this issue is without merit under the facts of the case. The complaintant was walking home at night and was first approached by Petitioner within about eight feet of a street light, allowing her a clear view of Petitioner. Petitioner struck up a conversation with the complaintant and walked with her for approximately six minutes. They separated and a few minutes later again approached the complaintant and it was at that time that he assaulted and threatened complaintant and during the assault and threats spoke with the complaintant and complaintant had full opportunity to observe Petitioner, his physical appearance, and his clothing, as there was sufficient light from the moon that night. After the complaintant escaped from Petitioner, she ran to a friend's house and called the police. Within approximately ten to fifteen minutes after the assault by Petitioner, the complaintant was driven by police to a motel where she observed through a window of the motel Petitioner and identified him as the one that had assaulted and robbed her of her purse and other belongings. After Petitioner had consented to a search of his motel room, the belongings taken by Petitioner from the complaintant were recovered and identified by the complaintant. The

complaintant had given a full and complete description of Petitioner's physical appearance and clothing prior to the pretrial identification. All of this testimony was admitted without objection by Petitioner. At trial, without objection, the complaintant again identified Petitioner in-court, as her robber and assailant. Because of the quickness of time between the robbery and being taken to the motel where she identified Petitioner as the robber, and because of the full and lengthy opportunity the complaintant had to observe Petitioner prior to and during the robbery, the pretrial identification of Petitioner cannot be described as impermissibly suggestive. Further, the in-court identification of Petitioner was fully reliable, based upon lengthy observation of Petitioner prior to and during the commission of the robbery under conditions where she could fully observe Petitioner, his clothing and physical appearance, and any pretrial identification of Petitioner by the complaintant, was not such as to cause a misidentification of Petitioner when he was identified by complaintant in court. S.F. 65-95, 101-105.[1] Petitioner's in-court identification, from a totality of the circumstances, was not tainted by any pretrial identification, but was of reliable independent origin, and any testimony regarding the pretrial identification did not violate Petitioner's constitutional rights. *See Manson v. Barthwaithe,* 432 U.S. 98 (1977); *Allen v. Estalle,* 568 F.2d 1108 (5th Cir. 1978); *Blasingame v. Estelle,* 508 F.2d 668 (5th Cir. 1975).

IV

Petitioner was not convicted and is not confined in violation of the constitution, laws or treaties of the United States.

WHEREFORE, PREMISES CONSIDERED, Respondent prays that Petitioner's application for writ of habeas corpus be dismissed or denied without an evidentiary hearing.

Respectfully submitted,

JIM MATTOX
Attorney General of Texas

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1. S.F. refers to the statement of facts of Petitioner's state trial.

DAVID R. RICHARDS
Executive Assistant
Attorney General

LESLIE A. BENITEZ
Assistant Attorney General
Chief, Enforcement Division

/s/

W. BARTON BOLING
Assistant Attorney General
Enforcement Division
El Paso Regional Office
BAR NO. 02577000

4824 Alberta Avenue, Suite 160
El Paso, Texas 79905
(915) 533-3484

Attorneys for Respondent

(Certificate of Service omitted in printing)

Magistrate's report and recommendation in *Petty v. McKaskle,* No. CA5-84-034, United States District Court, Northern District of Texas, Lubbock Division

Attached to the petition for writ of certiorari as Appendix C.

Order denying habeas relief in
Petty v. McKaskle, No. CA5-84-034

Attached to the petition for writ of certiorari as Appendix D.

Final judgment in
Petty v. McKaskle, No. CA5-84-034

Attached to the petition for writ of certiorari as Appendix E.

Opinion of the Court of Appeals for the Fifth Circuit in
Petty v. McCotter, No. 84-1488

Attached to the petition for writ of certiorari as Appendix F.

Order of the court of appeals
denying rehearing in
Petty v. McCotter, No. 84-1488

Attached to the petition for writ of certiorari as Appendix G.

No. 85-1656

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

O.L. McCOTTER, DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,
Petitioner,

V.

GREGORY ALLEN PETTY,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF PETITIONER

JIM MATTOX
Attorney General of Texas

MARY F. KELLER
Executive Assistant Attorney General for Litigation

F. SCOTT McCOWN
Assistant Attorney General
Chief, Enforcement Division

WILLIAM C. ZAPALAC
Assistant Attorney General

CHARLES A. PALMER*
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 463-2080

**Attorney of Record*

QUESTIONS PRESENTED

I. Whether a habeas petitioner who claims that he was denied the effective assistance of counsel must allege how he was prejudiced by counsel's performance.

II. Whether a federal appellate court should consider unexhausted issues raised for the first time on appeal by a habeas petitioner-appellant and remand to allow amendment of the petition to include those issues.

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No. 85-1656

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

O.L. McCOTTER, DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,
Petitioner,

V.

GREGORY ALLEN PETTY,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF PETITIONER

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES O.L. McCotter, Director, Texas Department of Corrections, Petitioner[1] herein, by and through his attorney, the Attorney General of Texas, and files this Brief.

1. For clarity, petitioner in this Court and respondent below, O.L. McCotter, Director, Texas Department of Corrections, will be referred to as the state, the real party in interest. Respondent in this Court and petitioner below, Gregory Allen Petty, will be referred to as Petty.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit was delivered on January 3, 1986, and is attached to the Petition for Writ of Certiorari as Appendix F; the order denying rehearing is attached to the petition as Appendix G. *Petty v. McCotter,* 779 F.2d 299 (5th Cir. 1986). The federal district court's order of dismissal and final judgment are attached as Appendices D and E, and the underlying magistrate's report and recommendation is attached as Appendix C. *Petty v. McKaskle,* No. CA5-84-34 (N.D. Tex.) (unpublished).

JURISDICTION

The judgment of the Court of Appeals was entered on January 3, 1986. A timely filed suggestion for rehearing *en banc* was denied on March 4, 1986. The petition for writ of certiorari was filed within thirty days after final judgment in the court below. The jurisdiction of this Court was invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., amend. VI, provides as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Title 28 U.S.C. § 2106 provides as follows:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court

lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

Title 28 U.S.C. §2244(b) provides as follows:

When after an evidentiary hearing on the merits of a material factual issue, or after a hearing on the merits of an issue of law, a person in custody pursuant to the judgment of a State court has been denied by a court of the United States or a justice or judge of the United States release from custody or other remedy on an application for a writ of habeas corpus, a subsequent application for a writ of habeas corpus in behalf of such person need not be entertained by a court of the United States or a justice or judge of the United States unless the application alleges and is predicated on a factual or other ground not adjudicated on the hearing of the earlier application for the writ, and unless the court, justice, or judge is satisfied that the applicant has not on the earlier application deliberately withheld the newly asserted ground or otherwise abused the writ.

Rule 41(b), Fed. R. Civ. P., provides as follows:

For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against he

> plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

Rule 2(c), 28 U.S.C. fol. § 2254, provides as follows:

> The petition shall be in substantially the form annexed to these rules, except that any district court may by local rule require that petitions filed with it shall be in form prescribed by the local rule. Blank petitions in the prescribed form shall be made available without charge by the clerk of the district court to applicants upon their request. It shall specify all the grounds for relief which are available to the petitioner and of which he has or by the exercise of reasonable diligence should have knowledge and shall set forth in summary form the facts supporting each of the grounds thus specified. It shall also state the relief requested. The petition shall be typewritten or legibly handwritten and shall be signed under penalty of perjury by the petitioner.

Rule 4, 28 U.S.C. fol. § 2254, provides as follows:

> The original petition shall be presented promptly to a judge of the district court in accordance with the procedure of the court for the assignment of its business. The petition shall be examined promptly by the judge to whom it is assigned. If it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court, the judge shall make an order for its summary dismissal and cause the petitioner to be notified. Otherwise the judge shall order the respondent to file an answer or other pleading within the time period fixed by the court or to take such other action as the judge deems appropriate. In every case a copy of the petition and any order shall be served

by certified mail on the respondent and the attorney general of the state involved.

Rule 5, 28 U.S.C. fol. §2254, provides as follows:

> The answer shall respond to the allegations of the petition. In addition it shall state whether the petitioner has exhauseted his state remedies including any post-conviction remedies available to him under the statutes or procedural rules of the state and including also his right of appeal both from the judgment of conviction and from any adverse judgment or order in the post-conviction proceeding. The answer shall indicate what transcripts (of pretrial, trial, sentencing, and post-conviction proceedings) are available, when they can be furnished, and also what proceedings have been recorded and not transcribed. There shall be attached to the answer such portions of the transcripts as the answering party deems relevant. The court on its own motion or upon request of the peitioner may order that further portions of the existing transcripts be furnished or that certain portions of the non-transcribed proceedings be transcribed and furnished. If a transcript is neither available nor procurable, a narrative summary of the evidence may be submitted. If the petitioner appealed from the judgment of conviction or from an adverse judgment or order in a post-conviction proceeding, a copy of the petitioner's brief on appeal and of the opinion of the appellate court, if any, shall also be filed by the respondent with the answer.

Rule 6(a), 28 U.S.C. fol. §2254, provides as follows:

> A party shall be entitled to invoke the processes of discovery available under the Federal Rules of Civil Procedure if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise, If necessary for effective utilization of discovery procedures, counsel shall be appointed by the judge for a petitioner who qualifies for the appointment of counsel under 18 U.S.C. § 3006A(g).

Rule 7(a), 28 U.S.C. fol. §2254, provides as follows:

> If the petition is not dismissed summarily the judge may direct that the record be expanded by the parties by the inclusion of additional materials relevant to the determination of the merits of the petition.

Rule 8(a), 28 U.S.C. fol § 2254, provides as follows:

> If the petition is not dismissed at a previous stage in the proceedings, the judge, after the anwer and the transcript and record of state court proceedings are filed, shall, upon a review of those proceedings and of the expanded record, if any, determine whether an evidentiary hearing is required. If it appears that an evidentiary hearing is not required, the judge shall make such disposition of the petition as justice shall require.

Rule 9(b), 28 U.S.C. fol. § 2254, provides as follows:

A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

STATEMENT OF THE CASE

The state has lawful custody of Petty pursuant to a judgment and sentence of the 99th District Court of Lubbock County, Texas, in Cause No. 19,914, styled *The State of Texas v. Greg Allen Petty.* Petty was charged by indictment with the felony offense of aggravated robbery, to which he entered a plea of not guilty. After a jury trial, Petty was found guilty and his punishment was set at fifty years imprisonment in the Texas Department of Corrections. Sentence was imposed on September 20, 1979. The Texas Court of Criminal Appeals affirmed the conviction on April 17, 1983, in an unpublished *per curiam* opinion. *Petty v. State,* No. 64,750. Petty has filed one state application for writ of habeas corpus pursuant to Tex.

Code Crim. Proc. Ann. art. 11.07 (Vernon Supp. 1979), and it was denied by the Court of Criminal Appeals on October 5, 1983. *Ex parte Petty,* No. 10,573.

Petty then filed a petition for writ of habeas corpus in the United States District Court for the Northern District of Texas, Lubbock Division. *Petty v. Procunier,* No. CA5-84-034. The United States Magistrate to whom the case was referred made findings of fact and conclusions of law and recommended that relief be denied. The district court adopted the magistrate's findings and recommendation and on May 14, 1984, ordered the case dismissed.

Petty perfected an appeal to the Court of Appeals for the Fifth Circuit. *Petty v. McCotter,* No. 84-1488. After Petty filed his *pro se* brief and the state filed a brief in response, the court granted Petty's motion for appointment of counsel, and appointed counsel thereafter filed a supplemental brief. The *pro se* brief filed by Petty raised two specific allegations of ineffective assistance of counsel which were not raised in the district court. First, Petty for the first time complained that trial counsel should have investigated why he was missing several teeth at the time of his guilty plea. Second, Petty asserted that trial counsel failed to investigate the possible defense of insanity. (A.F. 3-4).[2] The Fifth Circuit addressed the first of these grounds, finding it to be meritless. (A.F. 4). As to the second allegation, however, the Fifth Circuit remanded. In response to the State's argument that Petty had not alleged specific prejudice, the court held that "*Strickland [v. Washington,* 446 U.S. 668 (1984)] requires that prejudice be proved, not pleaded." (A.F. 5). In the alternative, the court held that Petty should be allowed to amend his petition in the district court to raise his new, unexhausted allegations of ineffective assistance of counsel.

> We are a court of error and ordinarily do not consider issues raised for the first time on appeal. The fact that Petty has now made these allegations,

2. "A." refers to the Joint Appendix. Those portions of the Joint Appendix which are attached as appendices to the Petition for Writ of Certiorari are designated by the following letter, *e.g.,* "F."

> however, indicates that he would raise them in the district court if he were given the opportunity to do so. Therefore, even if a pro se petitioner is required to allege specific prejudice that he must eventually prove, Petty should be given an opportunity to amend his pleadings in order to assert what he now contends.

(A.F. 4-5).

The state timely filed a suggestion for rehearing *en banc* raising the two questions presented to this Court, and it was summarily denied. On March 19, 1986, the Fifth Circuit granted the state's motion to stay the mandate to and including April 3, 1986.

On April 3, 1986, the state filed a petition for writ of ceritorari in this Court, following which Petty, through appointed counsel, filed a brief in opposition. On June 30, 1986, the Court granted certiorari.

SUMMARY OF ARGUMENT

The opinion of the court of appeals contains two errors with far-reaching implications. First, that court's interpretation of the pleading requirements of Rule 2(c), 28 U.S.C. fol. § 2254, and *Strickland v. Washington*, 466 U.S. 668 (1984), is in direct conflict with this Court's decision in *Hill v. Lockhart*, _____ U.S. _____, 106 S.Ct. 366 (1985). In holding that a habeas petitioner who pleads ineffective assistance of counsel need not allege specific prejudice, the court of appeals ignored the clear language of *Hill*. Moreover, the court of appeals' holding is at odds with the purpose of Rule 2(c), which is to enable the district courts to "screen" the many habeas petitions filed each year by state prisoners.

Of even greater significance, however, is the Fifth Circuit's radical departure from established appellate procedure in its treatment of the issues Petty raised for the first time on appeal. By remanding to allow Petty to amend his petition to include unexhausted issues raised for the first time in that court, the Fifth Circuit ignored the rule that issues first presented on appeal ordinarily will not be considered. If its opinion is

allowed to stand, it will profoundly affect the manner in which habeas petitions are handled in that circuit. Lacking prescience, the district courts will not be able to foresee what new claims may be raised on appeal. The Fifth Circuit's opinion, by remanding to allow for the inclusion of new issues on appeal, robs the district courts' judgments of their finality. This holding also works unfairly in that it deprives the state of an opportunity to plead abuse of the writ under 28 U.S.C. §2244(b) and Rule 9(b), 28 U.S.C. fol § 2254, in response to either an amended application or a second application filed by Petty.

ARGUMENT

I. BECAUSE PETTY'S APPLICATION FOR WRIT OF HABEAS CORPUS IN THE DISTRICT COURT DID NOT ALLEGE FACTS WHICH, IF TRUE, WOULD ENTITLE HIM TO RELIEF, IT WAS PROPERLY DISMISSED WITHOUT AN EVIDENTIARY HEARING.

A. *Rule 2(c), 28 U.S.C. fol. § 2254, requires a habeas petitioner to support his claims with specific factual allegations.*

"The writ of habeas corpus[3] is the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action," *Harris v. Nelson*, 394 U.S. 286, 290-91 (1969), and it is, therefore, accorded "extraordinary prestige." *Fay v. Noia*, 372 U.S. 391, 399 (1963). The scope of the writ is not unlimited, however, nor is its salutary purpose the only factor affecting its reach. *See Kuhlmann v. Wilson*, _____U.S._____, _____, 106 S.Ct. 2616, 2623 (1986). "Rather, the Court has performed its statutory task through a sensitive weighing of the interests implicated by federal habeas corpus adjudication of constitutional claims determined adversely to the prisoner by the state courts." *Id.* at _____, 106 S.Ct. at 2624, citing, *e.g.*, *Engle v. Isaac*, 456 U.S. 107, 126-29 (1982); *Stone v. Powell*, 428 U.S. 465, 489-95 (1976); *Fay v. Noia*, 372 U.S. at 426-34. Thus, for example, *Stone v. Powell* removed from the reach of federal habeas a state prisoner's claim "that

3. 28 U.S.C. §§ 2241, 2254.

evidence obtained in an unconstitutional search or seizure was introduced at this trial" unless the prisoner could show that the State had failed to provide him "an opportunity for full and fair litigation" of his Fourth Amendment claim, the Court being persuaded that any "advance of the legitimate goal of furthering Fourth Amendment rights" through application of the judicially created exclusionary rule on federal habeas is "outweighed by the acknowledged costs to other values vital to a rational system of criminal justice." *Id.* at 494.

Similarly, in *Wainwright v. Sykes*, 433 U.S. 72 (1977), the Court found that considerations of finality dictated that a state prisoner's failure to comply with a state's contemporaneous objection rule barred his claim from federal habeas review absent "cause" for the procedural default and resulting "prejudice." *Id.* at 87-91.

Although the Court's approach has been largely to weigh the prisoner's interests against those of the state, other considerations are present. Paramount among these is the immense burden placed on the federal district courts by suits under 28 U.S.C. § 2254. In the statistical year ending June 30, 1985, the federal district courts disposed of 6,872 applications for habeas corpus by state prisoners; another 1,510 applications were disposed of without court action.[4] *Annual Report of the Director*, Administrative Office of the United States Courts (1985); *see Kuhlmann v. Wilson*, _____ U.S. at _____, n.12, 106 S.Ct. at 2625 n.12.

The bulk of the weight of federal habeas litigation necessarily is shouldered by the district courts. "The federal district judges are more intimately familiar with state criminal justice, and with the trial of fact, than are we, and to their sound discre-

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4. This inundation of litigation has been characterized as "progressive trivialization of the writ..." *Brown v. Allen*, 344 U.S. 443, 536 (1953) (Jackson, J., concurring). *See also Kuhlmann v. Wilson*, _____ U.S. at _____ & n.12, 106 S.Ct. at 2625 & n.12; *Schneckloth v. Bustamonte*, 412 U.S. 218, 275 (1973) (Powell, J., concurring); Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U.CHI.L.REV. 142, 148 (1970); *Relieving the Habeas Corpus Burden: A Jurisdictional Remedy*, 63 IOWA L.REV. 392 (1977); Doub, *The Case Against Modern Federal Habeas Corpus*, 57 A.B.A.J. 323 (1971).

tion must be left in very large part the administration of federal habeas corpus." *Townsend v. Sain*, 372 U.S. 293, 313 (1963). The habeas rules[5] promulgated by the Court thus contemplate the district courts acting as a "screen" for the many applications filed each year. The rules provide, *inter alia*, that the petition "shall specify all the grounds for relief which are available to the petitioner and of which he has or by the exercise of reasonable diligence should have knowledge and shall set forth in summary form the facts supporting each of the grounds thus specified." Rule 2(c), 28 U.S.C. fol. § 2254.[6]

Rule 2(c) is important because it serves as the initial component of the screening process entrusted to the district courts by the habeas rules. Under Rule 4, 28 U.S.C. fol. § 2254, the district court may summarily dismiss a petition "[i]f it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief..." If the district court does not dismiss the petition at this stage, Rule 4 provides that "the judge shall order the respondent to file an answer or other responsive pleading within the period of time fixed by the court or to take such other action as the judge deems appropriate." After the respondent files an answer pursuant to Rule 5, the court then must determine whether to grant summary judgment or to conduct an evidentiary hearing under Rule 8. Summary judgment is appropriate if there is no genuine issue of fact to be resolved and one party is entitled to judgment as a matter of law. Rule 56, Fed. R. Civ. P.; *see Blackledge v. Allison*, 431 U.S. 63, 80-81 (1977). If, however, there are disputed material facts which cannot be resolved on the record, then an evidentiary hearing is required. *Boyd v. Dutton*, 405 U.S. 1, 3 (1972); *Townsend v. Sain*, 372 U.S. at 312-20. In

5. 28 U.S.C. fol. § 2254 (1976).

6. The habeas rules govern suits under 28 U.S.C. § 2254, but the Federal Rules of Civil Procedure "may be applied, when appropriate" to habeas actins so long as they "are not inconsistent" with the habeas rules. Rule 11, 28 U.S.C. fol. § 2254. *See also* Rule 81(a)(2), Fed. R. Civ. P. Although habeas corpus proceedings are characterized as "civil," the label is "gross and inexact" because the writ is "unique." *Harris v. Nelson*, 394 U.S. at 293-94. Thus, the pleading standard of Rule 2(c) differs considerably from that for civil actions generally. Rule 8(a) of the Federal Rules of Civil Procedure requires only that the complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief..."

deciding whether to hold an evidentiary hearing, the district court necessarily scrutinizes the petitioner's factual allegations, just as it does in its initial review of the petition under Rule 4 to decide whether it whould be summarily dismissed without requiring the respondent to answer. Absent the pleading standard of Rule 2(c), it would be impossible to make either determination.

Although the requirement of factual allegations in habeas cases has been criticized as unjustly harsh when applied to *pro se* litigants,[7] in fact, when balanced by the countervailing rule of *Haines v. Kerner,* 404 U.S. 519 (1972), that *pro se* pleadings are to be liberally construed, the requirement is a fair one. In other words, even though habeas petitioners must support their legal grounds with factual averments, their claims routinely are accorded the most generous of interpretations by federal habeas courts. Only those allegations which, when viewed against the record, are "palpably incredible" or "patently frivolous or false" are subject to summary dismissal. *Blackledge v. Allison,* 431 U.S. at 76, quoting *Machibroda v. United States,* 368 U.S. 487, 495 (1962) and *Herman v. Claudy,* 350 U.S. 116, 119 (1956).

Alleging each element of a claim is critical in habeas practice, however, because there is limited discovery. While under Rule 6(a), 28 U.S.C. fol. § 2254, the district court may grant discovery "in the exercise of his discretion and for good cause shown," in practice, discovery rarely is allowed in federal habeas, both because it is unduly burdensome and because it is largely unnecessary, given the pleading requirements of Rule 2(c). *See Harris v. Nelson,* 394 U.S. at 296. Widespread discovery in habeas cases would thwart the purpose of the writ, which is "to reach all manner of illegal detention [and]...to cut through barriers of form and procedural mazes..." *Id.* at 291. Given limited discovery in habeas cases, the pleadings take on added significance, and the strict application of Rule 2(c) assists the district courts in disposing of the mass of frivolous petitions so that they may more fully consider those few claims

7. *Developments in the Law-Federal Habeas Corpus,* 83 HARV.L.REV. 1038, 1174-75 (1970).

which seem to have some merit.[8] "[W]here specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is confined illegally and is therefore entitled to relief, it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry." *Harris v. Nelson*, 394 U.S. at 300. By summarily disposing of meritless petitions under Rule 2(c), the district courts are able to more fully employ the provisions of Rule 6 (discovery), Rule 7 (expansion of the record) and Rule 8 (evidentiary hearing) in that small minority of cases which raise substantial constitutional issues. *See Blackledge v. Allison*, 431 U.S. at 81-82.

B. *Hill v. Lockhart*, _____ U.S. _____, *106 S.Ct. 366 (1985), requires that a habeas petitioner claiming ineffective assistance of counsel specifically plead prejudice.*

Because the vast majority of federal habeas petitions allege ineffectiveness on the part of trial or appellate counsel,[9] Rule 2(c) is particularly significant as to such claims. *Strickland v. Washington*, 466 U.S. 668 (1984), teaches that a habeas petitioner who alleges that he received the ineffective assistance of counsel has the burden of demonstrating both that counsel's performance was deficient and that the deficient performance prejudiced the defense. In *Hill v. Lockhart*, _____ U.S. _____, 106 S.Ct. 366 (1985), a unanimous Court applied the two-prong test of *Strickland* to ineffective assistance claims in the context of a guilty plea and held that a habeas petitioner who alleges a sixth amendment violation must plead both prongs:

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8. One study shows that 3.2% of habeas petitions filed in the district courts are granted, *Federal Review of State Prisoner Petitions*, Bureau of Justice Special Report, 5 table 13 (March 1984). "The study indicates, however, that the actual success rate for all petitions submitted may be lower than the percentage shown since blatantly defective petitions were sometimes returned directly to the petitioner, and thus were not included in the 'total habeas corpus filings' against which successful petitions were measured." *Id.* at 5-6.

9. "Ineffective-assistance-of-counsel claims are becoming as much a part of state and federal habeas corpus proceedings as the bailiffs' call to order in those courts." *McKaskle v. Vela*, 464 U.S. 1053, 1056 (1984) (O'Connor, J., dissenting to denial of certiorari).

> In the present case the claimed error of counsel is erroneous advice as to eligibility for parole under the sentence agreed to in the plea bargain. We find it unnecessary to determine whether erroneous advice by counsel as to parole eligibility may be deemed constitutionally ineffective assistance of counsel, because in the present case we conclude that petitioner's allegations are insufficient to satisfy the *Strickland v. Washington* requirement of "prejudice." Petitioner did not allege in his habeas petition that, had counsel correctly informed him about his parole eligibility date, he would have pleaded not guilty and insisted on going to trial. He alleged no specific circumstances that might support the conclusion the he placed particular emphasis on his parole eligibility in deciding whether or not to plead guilty. Indeed, petitioner's mistaken belief that he would become eligible for parole after serving one-third of his sentence would seem to have affected not only his calculation of the time he likely would serve if sentenced pursuant to the proposed plea agreement, but also his calculation of the time he likely would serve if he went to trial and were convicted.
>
> Because petitioner in this case failed to allege the kind of "prejudice" necessary to satisfy the second half of the *Strickland v. Washington* test, the District Court did not err in declining to hold a hearing on petitioner's ineffective assistance of counsel claim.

Id. at _____, 106 S.Ct. at 371 (record citation omitted).

The holding of *Hill* is consistent with the rationale of Rule 2(c). *Strickland v. Washington* requires a habeas petitioner to demonstrate both an unprofessional act or omission on the part of counsel and resulting prejudice in order to make out a sixth amendment violation. "Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable." *Id.* at 687. Because a petitioner must prove both prongs of *Strickland* to justify issuance of the writ, it follows that he must plead both prongs in order

to avoid dismissal without a hearing. *Hill v. Lockhart* expressly so holds.[10] Thus, the court of appeals clearly erred in holding that "*Strickland* requires that prejudice be proved, not pleaded." (A.F. 5).

II. BY CONSIDERING UNEXHAUSTED ISSUES RAISED FOR THE FIRST TIME ON APPEAL AND REMANDING TO ALLOW THE HABEAS PETITIONER-APPELLANT TO AMEND HIS PETITION TO INCLUDE THOSE ISSUES, THE OPINION OF THE COURT OF APPEALS UNDERMINES THE FINALITY OF THE DISTRICT COURT'S JUDGMENT AND UNFAIRLY DEPRIVES THE STATE OF AN OPPORTUNITY TO PLEAD ABUSE OF THE WRIT UNDER 28 U.S.C. § 2244(B) AND RULE 9(B), 28 U.S.C. FOL. § 2254.

A. *The Fifth Circuit's disposition of Petty's new claims constitutes a radical departure from settled appellate procedure.*

"The Court of Appeals must look to the statute defining its appellate power, 28 U.S.C. § 2106, for guidance as to the kind of order which it may direct the District Court to enter,"[11] *Bryan v. United States*, 338 U.S. 552, 559 (1950), and whether the disposition in a particular case is authorized by the statute turns on whether it is "just under the circumstances." *Id.* Although the courts of appeals possess broad discretionary power, the courts have fashioned their own limitations on that

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10. The rule of *Hill* is hardly revolutionary. "Mere assertions of ineffective counsel...are not enough. Nor is it sufficient to refer to an act or omission of counsel without indicating why it constituted gross impropriety or prejudicial misconduct." *Bernier v. Moore*, 441 F.2d 395, 396 (1st Cir. 1971).

11. 28 U.S.C. § 2106 provides as follows:

> The Supreme Court or any other court of appellate jurisidiction may affirm, modify, vacate, set aside or reverse any judfment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the netry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

power. Thus, it is a firmly established rule of appellate review that issues raised for the first time on appeal will not be considered. *See* Annot., 76 A.L.R. Fed. 522, 524-25 (1986). There are, of course, exceptions to the rule, most notably where the law has changed, or where legal developments have occurred following the trial which affect the issue in question. *Id.* at 525-26. The Fifth Circuit also will review new issues on appeal which involve purely legal questions[12] where the failure to consider them would result in a miscarriage of justice. *Self v. Blackburn*, 751 F.2d 789, 793 (5th Cir. 1985); *United States v. Velasquez*, 748 F.2d 972, 973-74 (5th cir. 1984).

The instant case fits into no established exception. While holding that Petty was not required to plead how he was prejudiced by counsel's allegedly deficient representation, the court of appeals also held, in the alternative, that the case should be remanded so that Petty could amend his petition to include the factual allegations made for the first time on appeal as to the manner in which he was prejudiced:

> We are a court of error and ordinarily do not consider issues raised for the first time on appeal. The fact that Petty has now made these allegations, however, indicates that he would raise them in the district court if he were given the opportunity to do so. Therefore, even if a pro se petitioner is required to allege the specific prejudice that he must eventually prove, Petty should be given an opportunity to amend his pleadings in order to assert what he now contends.

(A.F. 4-5).

The new issues raised by Petty on appeal are not based on supervening authority and do not deal with strictly legal issues; instead, they involve intensely factual matters which cannot be resolved without a hearing. Thus, the Fifth Circuit's

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12. A question is purely legal if no facts could have been raised to develop the issue at an evidentiary hearing. *United States v. Velasquez*, 748 F.2d 972, 974 (5th Cir. 1984); *Higginbotham v. Ford Motor Co.*, 540 F.2d 762, 768 n.10 (5th Cir. 1976).

consideration of these matters did not aid in the final disposition of this cause and can in no sense be said to further the orderly administration of justice. Quite to the contrary. Since Petty's new claims have not been presented to the state courts, as required by 28 U.S.C. § 2254(b), (c), amendment of his petition to include them will render it subject to dismissal under *Rose v. Lundy*, 455 U.S. 509 (1982), for failure to exhaust state remedies.[13] The Fifth Circuit's approach works to perpetuate this action in both the state and federal systems. It thus frustrates the screening process entrusted to the district courts by the habeas rules and disserves valid interests in the orderly administration of justice.

> When the process of direct review—which, if a federal question is involved, includes the right to petition this Court for a writ of certiorari—comes to an end, a presumption of finality and legality attaches to the conviction and sentence. The role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited. Federal courts are not forums in which to relitigate state trials.

Barefoot v. Estelle, 463 U.S. 880, 887 (1983). *See also Kuhlmann v. Wilson*, _____ U.S. at _____, 106 S.Ct. at 2626-27; *Hill v. Lockhart*, _____ U.S. at _____, 106 S.Ct. at 370.

Moreover, the standard employed by the court of appeals creates an exception which swallows the rule and is wholly unworkable. Is it not true that a party who raises new claims in a higher court invariably thus evinces a desire to "raise them in the district court if he were given the opportunity to do so"? Adherence to such a standard can have but one result: evisceration of the proscription against new issues on appeal. The "screening process" envisioned by the federal habeas rules is thus destroyed and the judgments of the district courts are robbed of their finality. In addition, the habeas petitioner is

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13. The Fifth Circuit's opinion opines that "[i]n the interests of efficiency and finality, ... the state may prefer to waive this defense." (A.F. 5). There is nothing in the record to support his statement, and the state assures this Court that is does not and will not waive Petty's non-exhaustion of state remedies.

afforded an unwarranted second opportunity to plead his case. If he is unable to prevail on his initial, conclusory allegations, he need only make additional allegations on appeal in order to obtain a remand with directions to allow him to amend. Clearly, the court of appeals' disposition of Petty's appeal was not "just under the circumstances."

B. *Petty had ample opportunity to amend his petition in the district court.*

Further, to the extent the Fifth Circuit's opinion implies that Petty was not afforded an opportunity to amend his petition, it is factually incorrect. The standard habeas form utilized by Petty in the district court put him on notice that his claims must be supported by factual allegations:

> (6) Your attention is directed to the fact that you must include all grounds for relief and all facts supporting such grounds for relief in the petition you file seeking relief from any judgment of conviction.

(A.5).

Petty nonetheless failed to plead any facts which, if true, would establish a violation of the sixth amendment right to counsel. Instead, Petty alleged in only the most conclusory terms that counsel was derelict in failing to interview alibi witnesses (A.11), in conferring with him only once prior to trial (*Id.*) and in failing to advise Petty of the nature of the charge against him (*Id.* at 12).

Even when accorded the liberal construction mandated by *Haines v. Kerner,* 404 U.S. 519 (1972), these allegations are insufficient to withstand a motion for summary judgment. It is firmly established Fifth Circuit law that claims of uncalled witnesses are subject to dismissal where, as here, the witnesses are not named and the nature of their testimony is not set out. *Alexander v. McCotter,* 775 F.2d 595, 602 (5th Cir. 1985); *Boyd v. Estelle,* 661 F.2d 388, 390 (5th Cir. 1981). It is equally well settled that the brevity of an attorney's consultation time with a defendant does not, standing alone, make out a sixth amend-

ment violation. *Mattheson v. King,* 751 F.2d 1432, 1439 (5th Cir. 1985); *Murray v. Maggio,* 736 F.2d 279, 282 (5th Cir. 1984). Thus, Petty's allegation of ineffective assistance of counsel as originally pled in the district court could have been dismissed under Rule 4 without the state being ordered to answer.

The district court nonetheless directed the state to answer. In its responsive pleading, the state explicitly informed Petty that his allegation of a sixth amendment claim was facially deficient:

> Petitioner does not allege what pretrial investigation should have been conducted by counsel that was not conducted or how his defense would have been materially benefitted by any additional investigation by counsel; Petitioner does not allege what witnesses should have been interviewed by counsel that were not, does not allege what those witnesses would have testified to that would have been material to any defense of Petitioner, or that those witnesses would have in fact testified or that their testimony would have been admissible. Petitioner concedes in his petition that counsel did confer with Petitioner to receive a knowledge of the case, but Petitioner does not demonstrate how additional conferences would have benefitted counsel or any defense of Petitioner.

(A. 18).

Despite having the deficiencies in his pleadings directed to his attention, Petty failed to move for leave to amend his petition. Thus, in disposing of Petty's ineffectiveness claim, the magistrate not surprisingly found that it did not allege facts which, if true, would entitle him to relief:

> The first challenge advanced by petitioner is to the effectiveness of the attorney who had been appointed to represent him. Petitioner contends that the performance by the attorney was, at best, perfunctory, that she had conferred with him only one time prior to trial and on that occasion she attempted to persuade him to plead guilty and she was unprepared

> for jury trial, and that she failed to interview prospective defense witnesses.
>
> A habeas corpus petitioner has the burden to demonstrate by sufficient factual allegation and proof an identifiable lapse on the part of counsel as well as some actual adverse impact upon the fairness of his trial which results from that lapse. *Boyd v. Estelle*, 661 F.2d 388 (5th Cir. 1981); *Washington v. Watkins*, 655 F.2d 1346 (5th Cir. 1981). In this case petitioner has not met that burden. Although he contends that the attorney failed to interview prosepective defense witnesses and failed to prepare for trial, he has not identified any witnesses who should have been interviewed by the attorney nor has he identified any trial preparation or investigation which the attorney should have made but failed to do. Further, he has not demonstrated any actual adverse impact upon the fairness of his trial which resulted from those claimed deficiencies.

(A.C. 3).

The magistrate's report also advised Petty of his right to file objections thereto (*Id.* at 8) and admonished that the failure to timely file written objections "shall bar an aggrieved party from attacking the factual findings on appeal" (*Id.*). Petty ignored this second warning that his claims were inadequately pled; he did not object to the magistrate's report or otherwise move to correct the deficiency. Accordingly, the district court denied the writ (A.D. 1) and dismissed the cause (A.E. 1).

C. *The district court's dismissal of Petty's petition was an adjudication on the merits.*

There is no room for dispute as to the propriety of the district court's dismissal of Petty's petition, inasmuch as it fell short of the requirements of Rule 2(c). Indeed, the opinion of the court of appeals implicitly holds as much.

Petty has attempted to characterize the dismissal of his petition by the district court as based on a defect in the pleadings

and, therefore, not a decision on the merits. (Brief in Opposition at 2-3, 5-6). Had the district court summarily dismissed the position as facially inadequate under Rule 4 without requiring the state to answer, Petty's position would be tenable. *See Sanders v. United States*, 373 U.S. 1, 19 (1963). His argument must fail, however, for it ignores the reality of how habeas cases generally, and Petty's in particular, are processed by the district courts. Under Rule 5, 28 U.S.C. fol. § 2254, the state was obliged to furnish the district court with the relevant portions of the record of Petty's trial, appeal and state writ applications. The state did so (A.1), and both the magistrate (A.C. 2) and district court (A.D. 1) reviewed those records in adjudicating Petty's claims.[14] Because the district court considered matters outside the pleadings in concluding that Petty's claims were meritless, its decision denying habeas relief was, in effect, a grant of summary judgment and, hence, on the merits. *Schlang v. Heard*, 691 F.2d 796, 797-98 (5th Cir. 1982); *see Blackledge v. Allison*, 431 U.S. at 80-81.

Moreover, the language of the district court's judgment flatly refutes Petty's argument. Therein, the court "ordered, adjudged and decreed that the application for writ of habeas corpus filed by Gregory Allen Petty be, and it is hereby, denied and dismissed." (A.E. 1) Inasmuch as the court did not specify to the contrary, its dismissal was "an adjudication on the merits." Rule 41(b), Fed. R. Civ. P.; *see* 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE, § 2373 at 229 (1971).

D. *The result of the decision of the court of appeals is to deny the state the opportunity to plead abuse of the writ under 28 U.S.C. § 2244(b) and Rule 9(b), 28 U.S.C. fol. § 2254.*

It is very significant that the dismissal of Petty's petition was on the merits. Both 28 U.S.C. § 2244(b) and Rule 9(b), 28 U.S.C. fol. § 2244, are designed to preclude vexatious piecemeal litigation of habeas claims and to introduce "a greater finali-

14. Inasmuch as consideration of the state records was necessary to the assessment of Petty's claims, the district court would have committed reversible error had it dismissed the petition without reviewing those records. *Flowers v. Blackburn*, 759 F.2d 1195 (5thCir. 1985).

ty of judgements in habeas corpus proceedings." *See Kuhlmann v. Wilson*, _____ U.S. at _____, 106 S.Ct. at 2622 n.12. Rule 9(b) provides that:

> A second or successive petition may be dismissed if the judge finds that if fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

This Court recently adverted to the difference between the two prongs of Section 2244(b) and Rule 9(b), the "successive petition" doctrine and "abuse of the writ." *See Kuhlmann v. Wilson*, _____ U.S. at _____ n. 6, 106 S.Ct. at 2622 n.6. It is the latter situation, abuse of the writ, which is relevant in this case. The claims raised in Petty's application in the district court were reviewed on the merits and rejected by that court. Had the court of appeals followed the normal procedure and refused to consider issues raised for the first time on appeal, it simply would have affirmed the district court's denial of relief. *See, e.g., Smith v. United States Parole Commission*, 752 F.2d 1056, 1057 n.1 (5th Cir. 1985); *Healy v. Maggio*, 706 F.2d 698, 699 (5th Cir. 1983). Thus, in the event of a successive petition raising new claims, the state would have been able to plead abuse of the writ based on the merits review afforded Petty in the instant cause. This is not to say that a such a motion ultimately would succeed, or even that it would be appropriate.[15] Under such a disposition, however, the state

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15. The state believes that Petty's new claim—that his attorney failed to pursue an insanity defense—would be subject to dismissal for abuse of the writ on a subsequent petition under the reasoning of *Woodard v. Hutchins*, 464 U.S. 377, 379-80 (1984) (Powell, J., concurring). The point, however, is that the district courts have considerable discretion in ruling on a motion to dismiss for abuse of the writ. "The principles governing both justifications for denial of a hearing on a successive application are addressed to the sound discretion of the federal trial judges. Theirs is the major responsibility for the just and sound administration of the federal collateral remedies, and theirs must be the judgment as to whether a second or successive application shall be denied without consideration of the merits. Even as to such an application, the federal judge clearly has the power—and, if the ends of justice demand, the duty—to reach the merits." *Sanders v. United States*, 373 U.S. at 18-19.

would have had the option of pleading abuse of the writ in a subsequent proceeding.

By remanding to allow Petty to amend his petition to include allegations first made in the appellate court, the opinion unfairly deprives the state of its abuse defense. Because there has been no appellate review of the judgment of the district court, there is no finality to that court's review on the merits, and thus Petty's amended petition would not be subject to dismissal for abuse.[16]

By the same token, if Petty's amended petition were dismissed for failure to exhaust state remedies, the state would likewise be deprived of its abuse of the writ defense because a dismissal for failure to exhaust state remedies is not an adjudication on the merits. "[*Rose v.*] *Lundy* made plain that assertion of the unexhausted claims necessitates dismissal of the mixed petition and that dismissal of a mixed petition does not create a hurdle of writ abuse on petitioner's return." *Jones v. Estelle*, 722 F.2d 159, 168 (5th Cir. 1983) (en banc), *cert. denied*, 466 U.S. 976 (1984). Thus, although the requirement that the prior adjudication have been on the merits by its terms applies only to "successive petitions" which raise the same grounds, the "abuse of the writ" prong of Section 2244(b) and Rule 9(b) has been held by this Court and the court below to embrace the same requirement. When the court of appeals' decision is considered in light of *Rose v. Lundy*, it effectively abrogates the abuse of the writ doctrine. The end result is that the "equitable" nature of habeas corpus is flouted and state prisoners are allowed to engage in "needless piecemeal litigation...whose only purpose is to vex, harass, or delay." *Sanders v. United States*, 373 U.S. at 18.

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16. There is authority for the application of the abuse doctrine to an amended petition which raises new claims. *See Cody v. Missouri Board of Probation and Parole*, 468 F.Supp. 431, 434-35 (W.D. Mo. 1979). The state does not understand the law of the Fifth Circuit to be consistent with *Cody*, however, and as a practical matter it would be futile to plead abuse in the district court in response to an amended petition explicitly sanctioned by a higher court.

CONCLUSION

For the above reasons, Petitioner requests that the Court reverse the judgment of the court of appeals and affirm the judgment of the district court.

Respectfully submitted,

JIM MATTOX
Attorney General of Texas

MARY F. KELLER
Executive Assistant Attorney
General for Litigation

F. SCOTT McCOWN
Assistant Attorney General
Chief, Enforcement Division

WILLIAM C. ZAPALAC
Assistant Attorney General

CHARLES A. PALMER*
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 463-2080

Attorneys for Petitioner
**Attorney of Record*

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No. 85-1656

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

O. L. McCOTTER, DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,
Petitioner,

v.

GREGORY ALLEN PETTY,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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BRIEF OF RESPONDENT

JOHN R. BREIHAN
(Appointed by this Court)
BAKER & BOTTS
1410 United Bank Tower
400 West 15th Street
Austin, Texas 78701
(512) 478-1234
Attorney for Respondent

PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

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QUESTIONS PRESENTED

I. Whether, if a habeas petitioner's pleadings are insufficient, it is appropriate for the district court to make a decision on the merits.

II. Whether it is within the discretion of a circuit court to remand for amendment and an evidentiary hearing when a habeas petitioner clarifies his allegations on appeal.

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COMES NOW, Gregory Allen Petty, Respondent[1] herein, by and through his attorney, and files this Brief.

STATEMENT OF THE CASE

On May 29, 1979, Gregory Allen Petty was arrested and placed in jail in Lubbock County, Texas, where he was held until sentenced to the Texas Department of Corrections. On June 7, 1979, Gregory Allen Petty was indicted in the 99th Judicial District Court of Lubbock County for the offense of aggravated robbery. (T 3).[2] One month later, on July 10, 1979, Wanda Wray was appointed as Petty's counsel. (T 7). Two months later, on September 6, 1979, Petty was tried before a jury, which returned a verdict of guilty. (SF 244).

The next day, on September 7, 1979, Petty appeared before the same jury for sentencing. (T 247). The jury assessed Petty's punishment as confinement in the Texas Department of Corrections for a period of 50 years. (SF 281). On September 20, 1979, Petty was sentenced by the court to imprisonment for an indefinite term of not less than five years, nor more than 50 years. (T 26). Petty has been in the State's custody ever since.

On March 7, 1984, after an unsuccessful direct appeal and a state habeas proceeding, Petty filed his federal habeas petition, identifying six grounds for relief. (A 4).[3] Among the six, he alleged that he was denied effective

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[1] To parallel Petitioner's brief, Petitioner, O.L. McCotter, Director, Texas Department of Corrections, will be referred to herein as the state. Respondent, Gregory Allen Petty, will be referred to as Petty.

[2] For convenience, the following abbreviations are used herein in reference to the material within the record. "T" refers to the state Transcript. Page citations are used as employed in the index thereto. "SF" refers to the Statement of Facts from the State trial.

[3] To parallel Petitioner's brief, "A" refers to the Joint Appendix. Those portions of the Joint Appendix which are attached to the Petition for Writ of Certiorari are designated by the following letter, e.g., "F."

assistance of counsel. (A 11). This was the only claim considered by the Fifth Circuit on appeal and is the only claim now before this Court.

In his habeas petition, Petty alleged that Wanda Wray conferred with him only once prior to trial and only then to urge him to accept a plea bargain. (A 11). He alleged that she failed to interview prospective defense witnesses, that she failed to conduct a pretrial investigation, and that she was totally unprepared for trial. (A 11). Finally, he alleged, albeit imprecisely, that she failed to explain the nature of the charges against him. (A 12).[4]

On the same day Petty filed his petition, a magistrate acting for the district court ordered the state to file its answer to Petty's petition. (A 1). On April 11, 1984, the state filed its Answer and Supporting Brief. (A 1, 17). In its answer, the state pointed out, regarding Petty's ineffective assistance claim, that Petty "[did] not allege what pretrial investigation should have been conducted," (A 18) that he "[did] not allege what witnesses should have been interviewed" (A 18) and that he "[did] not demonstrate how additional conferences would have benefited counsel or any defense of [Petty]." (A 18). The state went on to pray for dismissal of all six of Petty's claims. (A 23).

On April 24, 1984, the magistrate filed his Report and Recommendation. (A 1 and AC-1). Regarding Petty's ineffective assistance claim, the magistrate noted that Petty "has the burden to demonstrate . . . and prove an identifiable lapse on the part of counsel as well as some adverse impact upon the fairness of his trial." (AC-3). The magistrate then noted that "in this case [Petty] has not met that burden." (AC-3). Nonetheless, the magistrate went on to

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[4] Petty's actual allegation was that "counsel neglected to explain the full legabity (sic) of the offense for which I was charged and indicted." (A 12).

examine the record and determine that "the representation afforded by appointed counsel was well within the standard of *MacKenna* v. *Ellis*, 280 F.2d 592, 599 (5th Cir. 1960)." (AC-4). He also recommended that all of Petty's claims be denied. (AC-8).

On May 14, 1984, the district court adopted the magistrate's findings and "denied and dismissed" Petty's petition. (A 1, AD-1 and AE-1).

SUMMARY OF ARGUMENT

The Fifth Circuit correctly observed that in his extensive *pro se* brief, Petty attempted, for the first time, to specify how his counsel's failure to conduct a pretrial investigation prejudiced his defense. (AF-3). Regarding Petty's two "prejudice" claims made on appeal, the Fifth Circuit reviewed and rejected Petty's claim that by conducting an investigation, his counsel could have better handled the identification issue. (AF-3, 4). However, the Fifth Circuit recognized that there could be some merit to Petty's claim that a pretrial investigation might have revealed a valid insanity defense. (AF-5). The Fifth Circuit reasoned that had Petty so pleaded at the district court level, he would have been entitled to an evidentiary hearing. (AF-4). Therefore, the Fifth Circuit remanded Petty's habeas action to the district court "with instructions to permit Petty to amend his petition, to permit the state to amend its answer and then to conduct such further proceedings as may be appropriate and consistent with this opinion." (AF-5).

The Fifth Circuit's disposition of this case was entirely appropriate under the circumstances. Petty filed his habeas action on the form attached to the Rules Governing Section 2254 Cases in the United States District Court. The form was adopted by the then-existing local rules of the district court and was supplied to him by the

district court. Petty pleaded in accorance with the Form's instruction to "tell your story *briefly* without citing cases or law." (A 11).

Though both the state in its answer and the magistrate in his Report and Recommendation determined that Petty's pleadings were insufficient, he was given no specific instruction to amend at any stage of the proceeding. Procedures for instructions to habeas petitioners are carefully provided in the Section 2254 Rules, as are procedures by which a district court may order the expansion of an incomplete factual record. What is more, the district court has a duty to develop a factual record sufficient to make an adequate inquiry of the petitioner's claims. *Harris* v. *Nelson*, 394 U.S. 286, 300 (1969).

The Fifth Circuit's decision to remand, with an opportunity for Petty to amend, is supported by the general rule that dismissals based on defects in pleading should not be made on the merits. The decision is further supported by the general rule that *pro se* habeas petitions are held to less stringent pleading standards than those required of attorneys and supported by the fact that this Court's decisions regarding the pleading requirements in ineffective assistance cases had not been decided at the time Petty filed his petition.

Finally, the Fifth Circuit's decision should be affirmed for the simple reason that it corrects the district court's failure to do all that could or should have been done in accordance with its duty to provide "the necessary facilities and procedures for an adequate inquiry" into his case. *Id.* at 300. As this Court recognized in *Blackledge* v. *Allison*, 431 U.S. 63, 83 (1977), "it may turn out upon remand that a full evidentiary hearing is not required." But Petty is "entitled to careful consideration and plenary processing of [his claim,] including full opportunity for presentation of the relevant facts." *Id.* at 83, 84, *quoting Harris* v. *Nelson*, 394 U.S. at 298.

ARGUMENT

I. THE DISTRICT COURT'S "DISMISSAL AND DENIAL" OF PETTY'S PETITION WAS INAPPROPRIATE.

There were six allegations before the district court when it considered Petty's habeas action.[5] Denial of five of the six on the merits was appropriate. With all but Petty's ineffective assistance of counsel claim, the district court had no trouble *reaching* the merits. Sufficient facts were pleaded by Petty to allow full consideration of his other claims. (A 12-14). Other facts were readily ascertainable in the record as needed.

The same was not true with Petty's ineffective assistance claim. Both the state in its answer and the magistrate in his Report and Recommendation (adopted by the district court) analyzed Petty's claim beginning with the conclusion that Petty's pleading was insufficient. (AC-3 and A 18). Both the state and the magistrate sought to analyze the record in relation to Petty's claim, but the record is of only limited benefit when considering claims of inadequacy of *pretrial* preparation and lack of advice given *prior* to trial, especially when one begins with the conclusion that the factual pleadings are insufficient.

Petty pleaded that "counsel only conferred with me one time before trial . . . to receive a brief knowledge of the case, and too (sic) deliver the . . . plea bargain deal." (A 11). He pleaded that "never was there a discussion of a

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[5] In addition to ineffective assistance of counsel, Petty pleaded that: (1) the indictment was fundamentally defective; (2) the state did not prove that he used or exhibited a deadly weapon during the robbery; (3) the state did not prove that the knife was a deadly weapon; (4) the court did not admonish him against self-incrimination when he was asked to open his mouth (to show his teeth for identification purposes) during trial; and (5) the court erroneously admitted evidence of an "impermissibly suggestive" pretrial identification. (A 12-14).

possible defense" (A 12) and that counsel failed to conduct a pretrial investigation. (A 11). The trial transcript and other trial court records do not reveal the extent of trial counsel's pretrial preparation or pretrial advice.

Though deference is due to appointed counsel's strategic judgments made in pretrial preparation, it is well established that "counsel has a duty to make a reasonable investigation or to make a reasonable decision that makes particular investigations unnecessary." *Strickland* v. *Washington*, 466 U.S. 668, 104 S.Ct. 2052, 2066 (1984). Petty alleged that his counsel was derilect in this duty. (A 11).

Petty made his allegations without elaboration. (A 11). Both the state in its answer and the magistrate in his Report and Recommendation stressed the deficiencies in Petty's pleading. (A 18 and AC-3). Then, both went on to examine the record in relation to the ineffective assistance claim as well as Petty's five other claims which were properly pleaded by Petty. (A 19 and AC-3). However, the only observations made about the record, as it related to Petty's ineffective assistance claim, were that: (1) counsel took part in voir dire of the jury, (2) counsel cross-examined witnesses, (3) counsel made a closing argument, (4) counsel was appointed two months before trial, (5) counsel was assisted by other counsel, and (6) counsel made objections. (A 19 and AC-3).

The record does not identify any particular investigation or any advice. Neither the state, nor the magistrate referred to any investigation or advice shown by the record, but both concluded, after review of the record, that Petty was not entitled to relief on any of his six claims. (A 19, 23 and AC-3, 8). The district court adopted the magistrate's findings and "dismissed and denied" Petty's petition in its entirety without a hearing. (AD-1 and AE-1).

The state contends that the district court's "dismissal and denial" was proper in relation to Petty's ineffective assistance claim and that, even as to this claim, the dismissal was properly made on the merits. Petty disputes both contentions.

A. District Courts Have A Duty To Develop Habeas Factual Records In Appropriate Cases.

The state argues at long length that Rule 2(c) is the cornerstone of a screening process, "the strict application of [which] assists the district courts in disposing of the mass of frivolous petitions so that they may more fully consider those few claims which seem to have some merit." (State's Brief at 12, 13). Petty recognized that some factual pleading was required of him. The form on which he filed his petition so instructed him. For that reason, in addition to pleading simply that he did not receive effective asistance of counsel, he alleged that his counsel failed to give him necessary advice or conduct a sufficient pretrial investigation.

From Petty's perspective these allegations are factually pleaded. Of course, the state, the magistrate and the district court concluded otherwise at the trial level. The Fifth Circuit recognized why the district court had so concluded, i.e., that "Petty failed to allege that he suffered any specific prejudice." (AF-2). In light of facts extensively set out by Petty in his *pro se* brief, the Fifth Circuit found that Petty's was an appropriate case for expansion of the factual record.

In its zeal, the state overstates the purpose of factual pleading. Nothing about habeas pleading requirements has ever been "strictly applied" by this Court or any court. *Haines* v. *Kerner*, 404 U.S. 519, 521 (1972), stands for the proposition that *pro se* petitions are held "to less stringent standards than formal pleadings drafted by lawyers."

The policy behind the requirement of factual pleading is more than simply to reduce the workload of district judges. Habeas petitioners "as the Congress and this Court have emphasized, . . . are entitled to careful consideration and plenary processing of the claims *including full opportunity for presentment of the relevant facts.* (Emphasis added.) *Harris* v. *Nelson*, 394 U.S. at 298. Factual pleading is only the first step of a system designed to develop a factual record sufficient to support "careful consideration" of habeas claims by the district courts. Other important procedures are needed so as not to allow a habeas proceeding "to founder in a 'procedural morass'" simply because "the petitioner, being in custody, is usually handicapped in developing the evidence needed to support in necessary detail the facts in his petition." *Id.* at 291, *quoting Price* v. *Johnston*, 334 U.S. 266, 269 (1948).

While the burden of factual pleading must, by nature, originate with the habeas petitioner, the burden does not rest entirely upon the shoulders of the *pro se* habeas petitioner. A habeas petitioner must identify his constitutional complaint and, pursuant to *Strickland*, and *Hill* v. *Lockhart*, ___ U.S. ___, 106 S.Ct. 366 (1985), must show actual prejudice at the trial level by further factual allegation. On the other hand, in cases where the petitioner fails to follow the pleading requirements, but where there remains "reason to believe the petitioner may, if the facts are fully developed, be able to demonstrate that he is confined illegally," then it *"is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry."* (Emphasis added). *Harris* v. *Nelson*, 394 U.S. at 300.

Procedures for the development of the factual record by the district court are well established. These procedures, discussed later in this brief, are carefully provided in the Rules Governing Section 2254 Proceeding in the United

States District Courts (the "Section 2254 Rules") promulgated by this Court and adopted by Congress in 1976.

Full development of a factual record, through the variety of pleading requirements and other procedures, is essential, because this Court has instructed that "[i]t is the typical, not the rare, case in which constitutional claims turn upon a resolution of contested factual issues." *Townsend* v. *Sain*, 372 U.S. 293, 312 (1963). Without fully developing a factual record when necessary, by whatever means is available, the district court fails in its duty to provide the necessary facilities and procedures for an adequate inquiry. *Harris*, 394 U.S. at 300.

B. Several Options Were Available For The Development By The District Court Of The Factual Record.

Townsend v. *Sain* requires that district court hold an evidentiary hearing "where the facts are in dispute." *Townsend* v. *Sain*, 372 U.S. at 312. The Advisory Committee Note to Rule 8, 28 U.S.C. fol. 2254, makes it clear that in situations where the grant of an evidentiary hearing is not required, then it rests within the discretion of the district court whether to grant a hearing.

The Section 2254 Rules provide many, less time-consuming options for the development of the factual record by the district court. At the outset, return of the petition under Rule 2(e), 28 U.S.C. fol. 2254, with instructions as to its insufficiency is designed to prompt a more factually pleaded response. Similarly, summary dismissal under Rule 4, 28 U.S.C. fol. 2254, would serve to encourage better factual pleading. Another option is to order an answer, which requires the state to produce part or all of the transcript. Rule 5, 28 U.S.C. fol. 2254.

Even after the state has answered, district courts can fulfill their duty to provide for an adequate inquiry by expansion of the factual record under Rule 7, 28 U.S.C.

fol. 2254. The state may be correct in its assertion that discovery is rarely used in federal habeas actions (State Brief at 12), but this is certainly not because habeas petitioners are normally adept at pleading their cases. Petty's pleading insufficiencies are not an uncommon problem.

Pleading insufficiencies represent a recurrent problem, one that this Court has recently dealt with in *Strickland* and *Hill*. However, Petty's petition presents this typical pleading problem in a slightly different light. Petty Pleaded, "factually," that his counsel failed to investigate his case and to render appropriate advice and that for five other reasons he should be afforded relief. Petty's allegations may be characterized as either statements of fact or conclusory statements, based primarily upon the reader's, or writer's, perspective. If Petty's allegations are true, the "prejudice" from Petty's allgations is obvious. Appointed attorneys have a duty to conduct *some* pretrial investigation. *Strickland*, 104 S.Ct. at 2066.

The difficulty in characterizing Petty's ineffective assistance pleading as factual or conclusory is deepened since the allegations were made in a single petition with five other properly pleaded allegations. For that reason, Petty's pleading was probably not so obviously insufficient that it could reasonably be expected to be quickly returned by a clerk under Rule 2(e)[6] and yet the district court found Petty's allegations factually insufficient and denied his request for an evidentiary hearing. (AD-1 and AE-1). However, since the district court had a *duty to provide for an adequate inquiry*, Petty's case is one in

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[6] The Advisory Committee Note to Rule 2(e), 28 U.S.C. fol. 2254 interprets Rule 2(e) to authorize the clerk to return certain petitions before review by the judge. "Subdivision (e) allows the clerk to return an insufficient petition to the petitioner, and it must be returned if the clerk is so directed by a judge of the court."

which the district court should have either granted a discretionary evidentiary hearing or ordered expansion of the factual record. *See*, *Clark* v. *Blackburn*, 619 F.2d 431 (5th Cir. 1980).

Development of the factual record by discovery is limited in habeas actions *only* to the extent that either a party must obtain leave of court to proceed under Rule 6 or under Rule 7 "the judge must direct that the record be expanded . . . by the inclusion of additional materials relevant to the determination of the merits of the petition." The Advisory Committee Note to Rule 7 explains that "the purpose (of Rule 7) is to enable the judge to dispose of some habeas petitions not dismissed on the pleadings, without the time and expense required for an evidentiary hearing." The Rule 7 Advisory Committee Note goes on to clarify, quoting *Raines* v. *United States*, 423 F.2d 526, 529-530 (4th Cir. 1970), that:

> Unless it is clear from the pleadings and the files and records that the prisoner is entitled to no relief, the statute makes a hearing mandatory. We think there is a permissible intermediate step that may avoid the necessity for an expensive and time-consuming evidentiary hearing in every Section 2255 case. It may instead be perfectly appropriate, depending upon the nature of the allegations, for the district court to proceed by requiring that the record be expanded to include letters, documentary evidence, and in an appropriate case, even affidavits. (Citations omitted)

While the state may be correct that expansion of the record by discovery is not often seen in habeas cases, the procedures for discovery are in place and this Court has instructed district courts to expand the record "where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is illegally confined." *Harris* v. *Nelson*, 394 U.S. at 300.

Petty's allegations, that his appointed counsel failed to investigate his case prior to trial and that she failed to give advice regarding the trial of his case, are serious allegations that cannot be fully investigated solely by review of the trial record. Therefore, in accordance with the district court's duty, the record should have been further developed by either granting of an evidentiary hearing, ordering expansion of the record or returning Petty's petition with instructions to elaborate.

C. Dismissals Due To Defects In Pleadings Are Not Normally Made On The Merits.

The state in its answer recognized that Petty's pleadings were insufficient. (A 18). The magistrate so reported to the district court in his Report and Recommendation. (AC-3). The district court so found by adoption of the magistrate's Report and Recommendation. (AD-1 and AE-1). On appeal, the Fifth Circuit recognized that "the district court dismissed [Petty's ineffective assistance] claim because Petty failed to allege that he suffered any specific prejudice as a result of his counsel's actions." (AF-2). The Fifth Circuit, therefore, remanded with instructions to the district court to allow Petty to amend his petition to plead "prejudice." (AF-2, 5).

The state takes the position that the district court's judgment was necessarily "made on the merits because the state answered and the district court reviewed the record." (State's Brief at 20). If this argument is correct, then in the future, as Petty sought to properly plead "prejudice" by his counsel's failure to investigate his insanity defense or because of any other failure of trial counsel, Petty would face defenses of res judicata and abuse of the writ under Rule 9(b), 28 U.S.C. fol. § 2254. (State's Brief at 22).

Such a result is not in keeping with the general rule that a dismissal based upon a defect in pleading, such as a *Hill-*

type defect, should not be made on the merits. As this Court wrote in *Costello* v. *United States*, 365 U.S. 265, 286 (1961):

> If the first suit was dismissed for defect of the pleading, or parties, or a misconception of the form of proceeding, or was disposed of on any ground which did not go to the merits of the action, the judgment rendered should not bar another suit.

Further, a dismissal with prejudice for failure to state a claim is inappropriate unless it appears "beyond doubt" that no set of facts can be proven to support the claim. *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957).

As to Petty's five allegations, other than ineffective assistance, the district court's decision was properly made on the merits. In regards to Petty's ineffective assistance claim, however, by adoption of the magistrate's Report and Recommendation, the district court first found that Petty's pleading was insufficient then, according to the state, ruled upon the merits.

The state's argument under Fed. R. Civ. Pro. 41(b) is unavailing. The Advisory Committee Note to Rule 11, 28 U.S.C. fol. 2254 does recognize that habeas proceedings are normally characterized as civil in nature.[7] However, application of Fed. R. Civ. P. 41(b) in this case is not appropriate. The pleading rules in Section 2254 cases are vastly different than in ordinary civil litigation where notice pleading is sufficient. In addition, application of Rule 41(b) in this case would be especially harsh where

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[7] For that reason, Rule 11 provides that the Federal Rules of Civil Procedure "may be applied when appropriate to petitions filed under [the Section 2254 Rules]" and Fed. R. Civ. P. 81(a)(2) provides that the federal rules are applicable to habeas proceedings "to the extent that the practice in such proceedings is not set forth in statutes of the United States."

Petty was proceeding *pro se* and where he never received specific notice of his pleading insufficiency.

The 10-day objection period provided by the magistrate's report was, under the circumstances, inadequate and wholly uncalculated to draw Petty's attention to a particular problem. First, Petty's pleading had already passed initial examination under Rule 2(e) and Rule 4 without return or dismissal. Second, though the state and the magistrate noted the insufficiency, they purported to reach the merits in their pleadings. Third, and finally, Petty's petition and the magistrate's Report and Recommendation were complicated because of Petty's inclusion of five allegations other than ineffective assistance.

Though it would be improper to apply Rule 41(b) to Petty's case, other federal procedure rules illustrate further options available to the state and the district court in handling Petty's case. Instead of, or in the alternative to an answer, the state could properly have made a motion under Fed. R. Civ. P. 12(b) to dismiss Petty's ineffective assistance claim for failure to state a claim or under Fed. R. Civ. P. 12(e) for a more definite statement. Indeed, the district court, after examination of Petty's petition under Rule 4, could have ordered the state to file such a pleading as authorized by Rule 4.

By its decision the Fifth Circuit simply placed Petty into the position he would have occupied had Petty's ineffective assistance claim been properly separated from his other claims and treated under Rule 2(e) by notification, under Rule 4 by summary dismissal, or under Rule 7 by expansion of the record.

D. Petty's Pleading Defect Was In Part Due To His Use Of The Form Affixed To The Rules Governing Section 2554 Cases.

Petty filed his petition on March 7, 1984, on a form (the "Form") supplied to him by the district court, in accor-

dance with Rule 2(c), 28 U.S.C. fol. 2254. The Form instructs *pro se* habeas petitioners to "tell your story *briefly* without citing cases and law" and to "state *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the *facts* supporting each ground." (A 9-11). There was and is no mention in the Form that "prejudice" should be pleaded by *pro se* habeas petitioners. In fact, there was no suggestion that a *pro se* habeas petitioner must allege adverse impact or any additional fact in an ineffective assistance claim other than as needed to state any of the other nine often-raised grounds for relief listed on the Form. (A 10, 11).

The conflict between the instructions on the Form and the newly-developed *Strickland* and *Hill* pleading requirements played a part in the Fifth Circuit's decision. In its opinion the Fifth Circuit recommended that district courts modify the standard forms provided to *pro se* habeas petitioners to require them to specifically allege prejudice when pleading ineffectiveness of counsel. (AF-5).

The Fifth Circuit's recommendation is in keeping with the *Haines* v. *Kerner* rule that *pro se* petitions be held to less stringent standards, which is particularly applicable in this case where a *pro se* petitioner has pleaded in accordance with a form provided for his use by the district courts pursuant to federal rules. Even when using the Form, the advisory committee recognized that "the adequacy of a petition will continue to be affected largely by the petitioner's intelligence and the legal advice available to him." Rule 2, 28 U.S.C. fol. 2254, advisory committee note.

The best that can be reasonably expected of a *pro se* petitioner, regardless of his inteligence, is a pleading in accordance with the instructions given in the Form. With five out of six claims, Petty managed to plead sufficient

facts for the district court to properly reach the merits. The Fifth Circuit's decision to remand for amendment of Petty's ineffective assistance claim is proper as it avoids penalizing Petty for following the Form's instructions or for any lack of intelligence or lack of legal advice that led to the insufficient pleading of his claim.

E. Pleading Requirements Regarding Ineffective Assistance Claims Were Only Developing At The Time Of Petty's Petition.

Petty's petition was filed on March 7, 1984. The district court ruled on May 14, 1984, which coincidently was the same day this Court decided *Strickland*. The *Strickland* requirement that a petitioner must plead and prove "prejudice," not simply "adverse impact,"[8] was closely followed by *Hill* to specifically require "prejudice" to be pleaded prior to the grant of an evidentiary hearing.

These additional proof and pleading requirements, however, came after Petty's petition had been ruled upon by the district court. In addition, the Form used by Petty as his petition made no suggestion that Petty refer to case law to determine what he must plead, nor was there any instruction explaining the purpose for which factual pleading was reqired. As the Form is now drafted, there exists a conflict between its instructions to "state briefly the facts" and those of *Strickland* and *Hill* that a petitioner must specifically plead deficiencies of representation and prejudice caused as a result. *Hill*, 106 S.Ct. at 369. Because the *Strickland* and *Hill* pleading requirements came about in time after Petty's petition was filed and ruled upon, the Fifth Circuit's decision to remand

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[8] A habeas petitioner pleading ineffective assistance in the Fifth Circuit prior to *Strickland* and *Hill* was required to prove an identifiable lapse in counsel's representation and actual, adverse impact upon the trial. *Boyd* v. *Estelle*, 661 F.2d 388, 389-90 (5th Cir. 1981).

with an opportunity for Petty to amend his petition was appropriate.

F. Review Of The Record Reveals That Judgment Thereon Was Inappropriate.

The state asserts that the district court's dismissal was made on the merits, and amounted to summary judgment, even as to Petty's ineffective assistance claim. For reasons stated herein, Petty states that the dismissal should never have reached the merits. Further, as to Petty's ineffective assistance claim, however, summary judgment would be improper because the record before the district court presented fact questions as to Petty's allegations.

The magistrate's Report and Recommendation, made without an evidentiary hearing, focused only on the fact that trial counsel conducted a voir dire examination, cross-examined witnesses and made closing argument. (AC-3). The fact that trial counsel participated in these aspects of the trial is not dispositive of the serious allegations concerning pretrial preparation raised by Petty in this case. *See*, *Clark* v. *Blackburn*, 619 F.2d at 434. The magistrate did not in any way report upon the substance of the record in his Report and Recommendation.

A review of the record reveals at least two instances where trial counsel's failure to investigate or to give advice may have prejudiced Petty's case. Neither was mentioned in Petty's petition or *pro se* Fifth Circuit brief, but both are revealed by the record and both create fact questions as to Petty's claims which render summary judgment inappropriate. *Id.* at 434.

The two readily identifiable instances wherein trial counsel's representation may have fallen short of constitutional standards involve (1) pretrial investigation of the voluntariness of Petty's consent to a search of his motel

room after his arrest and (2) advice given to Petty regarding the decision to take the stand during the sentencing phase.

Reviewing the record reveals that trial counsel's only real strategy during the guilt/innocence phase of the trial was to contest identification. The prosecutor's principal closing argument on the issue of identification, however, concerned Petty's "confession" about the location of the fruits of the robbery. (SF 221, 225 and 242).

Petty's "confession" was established in the testimony of the arresting officers. After arrest, according to Officer Green's testimony, Petty was asked, "if he knew where the victim's purse was?", to which Petty allegedly responded, "Yes, it's in my room, room Number 12, Joy Motel." (SF 163). Whereupon, the arresting officer testified that he asked Petty to sign a consent to search form (SF 163), then went with Petty to recover the purse and its contents from the motel room. (SF 166).

An investigation of Petty's case should have involved whether Petty's alleged "confession" was truly voluntary. The consent to search form itself, signed by Petty and witnessed by the officers and the motel desk clerk, conflicts with the testimony of the arresting officers. The officers testified that after obtaining Petty's statement about the location of the purse, they completed the consent to search form in the presence of and witnessed by the motel desk clerk, and then, proceeded to search the room. (SF 163, 166). However, the consent to search form describes the purse and its contents in detail, though supposedly completed prior to the search. (SF 166, 298).

There is no evidence in the record that Petty's attorney ever investigated the voluntariness of the search. She did not call the desk clerk as a witness. She did not request a pretrial evidentiary hearing or file any pretrial motions to exclude the evidence. She did not object to the admission

of the consent to search form. (SF 166, 298). Nor did she object to the admission of the purse and its contents. (SF 93).

While investigation may reveal that the search of Petty's room was absolutely voluntary, *the record reveals no investigation by Petty's attorney.* Petty's allegation is that counsel did not investigate his case prior to trial as she has a duty to do. *Strickland*, 104 S.Ct. at 2066. If she had, and if the purse and the "confession" could have been kept out of evidence, then the prosecutor's most devastating counter-argument to Petty's identification defense would have been silenced. What is more, investigation would have been simple. The name of a disinterested witness appeared on the consent to search form itself. (SF 298). He was a witness to the arrest, the consent and possibly to the search itself. Since the record does not negate Petty's allegation of a lack of investigation, then judgment on the record was inappropriate.

An additional fact question was raised by Petty's inartfully pleaded claim that his counsel did not advise him regarding the case. A particular example from the record that supports this claim regards his own testimony during the sentencing phase. Petty's counsel called him to the stand principally to explain to the jury why he was missing certain teeth. (SF 251, 252). Identification may have been an important issue during the case in chief, but because of the jury's verdict of guilty, the explanation for his missing teeth came too late. Hence, Petty was placed on the stand for no useful purpose.

The effect of the cross-examination of Petty was undeniably damaging. He made several damaging admissions that were nonresponsive to the prosecutor's questions and which reflected that his trial counsel had failed to advise or prepare him in any way for cross-examination. (SF 255-261).

In response to a question about whether scaring people was his idea of fun, Petty admitted he had "been to a party and we had been drinking and smoking." (SF 225). In response to a question about whether violation of the law was a violation of the terms off his probation, Petty said "you've got to get caught first." (SF 256). The prosecutor passed the witness after a brief cross-examination, and Petty's counsel, instead of resting, asked if Petty had a drug problem—an issue she had not raised, nor had it been mentioned in the case up to that time. (SF 257). The effect of her question was not only to introduce another reason for the jurors to dislike Petty, but to allow the prosecutor to continue with an even more devastating cross-examination. (SF 258-261).

Petty claimed he received no advice regarding the trial. A review of the cross-examination of Petty during sentencing does not negate his sworn allegation. Hence, judgment on the record was inappropriate.

II. SINCE THE DISMISSAL OF PETTY'S CLAIM WAS DUE TO A PLEADING INSUFFICIENCY, PETTY SHOULD HAVE BEEN AFFORDED AN OPPORTUNITY TO AMEND OR SHOW REASON WHY HIS COMPLAINT SHOULD NOT HAVE BEEN DISMISSED.

Petty contends that his ineffectiveness assistance allegation was dismissed due to a pleading insufficiency and that, therefore, the district court should never have reached the merits of his case. Therefore, Petty contends that a decision regarding his ineffective assistance claim was improperly included in the district court's dismissal and denial of Petty's five other habeas claims. Instead of dismissal and denial, the district court should have taken any of a number of less drastic measures regarding Petty's claim.

A. Petty Should Have Been Notified Pursuant To Rule 2(e) Of The Reasons His Petition Was Insufficient.

One proper disposition of Petty's ineffective assistance claim would have been to return the petition to Petty pursuant to Rule 2(e) of the Section 2254 Rules.

Upon first glance, Petty's ineffective assistance pleading appears to be properly pleaded. Statements were made by Petty that appear to be facts, as viewed from his perspective. From another perspective, as the state, the magistrate and the district court concluded, Petty's allegations are merely conclusory. Without a pleading of prejudice, Petty's factual assertions may be considered "conclusory," when viewed from the perspective of *Strickland* and *Hill*. This is how the Fifth Circuit viewed the district court's dismissal. (AF-2).

On the other hand, Rule 2(e) does not merely refer to gross errors in pleading, such as the failure to utilize the Form, but refers to any Rule 2(c) insufficiency. As the state points out, Rule 2(c) requires that some degree of factual content be pleaded by habeas petitioners. In particular, Rule 2(c) states that the petition "shall set forth in summary form the facts supporting each of the grounds thus specified." If a petition is not in compliance with Rule 2(c), then Rule 2(e) requires the petition to be returned to the petitioner "*with a statement of the reason for its return.*"

Rule 4, 28 U.S.C. fol. 2254, requires that "the original petition be presented promptly to a judge" and that "the petition shall be examined promptly by the judge to whom it is assigned." Rule 4 then calls for the judge to either order summary dismissal of the petition "and cause the petitioner to be notified" or "order the respondent to file an answer or other pleading." Summary dismissal does not reach the merits. *Sanders* v. *United States*, 373

U.S. 1, 19 (1963). Where the record does not conclusively show that a habeas petitioner is entitled to no relief, then the "better course" is to "direct petitioner to amend his motion." *Id.* at 19.

On the same day, March 7, 1984, that Petty's petition was filed, it was presented to the magistrate who ordered that the state file its answer. Presumedly, the magistrate examined Petty's petition for purposes of compliance with Rule 2(c) and presumedly Petty's petition passed muster upon initial examination. In fact, five of Petty's six allegations were properly pleaded under Rule 2(c).

Yet, both the state's answer and the magistrate's Report and Recommendation concluded that Petty's pleadings were insufficient and eventually, by adopting the magistrate's findings, so did the district court. However, Petty was never specifically instructed as to such a finding under either Rule 2(e) or Rule 4.

There is nothing in the Rules Governing Section 2254 Proceedings that withdraws the application of Rule 2(e) once an answer has been required from the state. Rule 8, 28 U.S.C. fol. 2254, provides that even if the judge determines that an evidentiary hearing is not required, then "the judge shall make such disposition of the petition as justice shall require." He does not become limited in his discretion simply because he has previously ordered the state to file an answer. Rule 2(e) should be applied at any time a pleading insufficiency is found and so should have been utilized by the district court below.

B. In The Alternative, The District Court Should Have Ordered The Expansion Of The Record.

Rule 7, 28 U.S.C. fol. 2254 provides for the expansion of the record by order of the district court. The Advisory Committee Note to Rule 7 encourages district courts to utilize this step to expand the factual record in situations

where the existing record and the factual pleadings are insufficient to make a proper determination as to whether to hold an evidentiary hearing. Petty's case presented a tailor-made "expansion of the record" case to the district court.

Rule 7 authorizes the use of written interrogatories propounded by the judge to the parties. Interrogatories to Petty or his trial counsel directed to pretrial investigation and advice given to Petty may have garnered the factual information missing from the record and Petty's petition. Based upon the answers made to judicial interrogatories, the district court may then have properly reached the merits.

C. In the Alternative, Petty Should Have Been Afforded An Opportunity To Show Reasons Why His Petition Should Not Be Dismissed.

Respondent attempts to equate the 10-day objection period within which the parties were to object to the magistrate's proposed findings with an opportunity for Petty to amend or show reasons why his petition should not be dismissed. This is inappropriate with a *pro se* petitioner. As the Advisory Committee Note to Rule 2(c) reflects, the adoption of the form used by Petty to file his petition was at least in part directed for the benefit of the petitioner. It was recognized that *pro se* petitioners are not well-versed in the interpretation of general pleading guidelines. For the same reason, Petty should not be expected to interpret the general 10-day objection period to indicate that he must replead his effectiveness of counsel allegations.

After determining that Petty's pleading was insufficient, the magistrate proceeded to review the record to determine, albeit incorrectly, that Petty had received effective assistance. Petty was therefore led to believe that the requirement of factual pleading was not critical to

consideration of his case. As in *Clark* v. *Blackburn*, the magistrate's review of only limited aspects of the record "is not dispositive of the serious allegations concerning pretrial preparation in the petition." *Clark*, 619 F.2d at 434. If there was a message to Petty within the magistrate's Report and Recommendation that he should replead, it was understandably lost on Petty as a *pro se* petitioner.

Even as a *pro se* petitioner, Petty knew he had been prejudiced by the omissions of his trial attorney and he attempted to identify those acts and omissions as best he could. Petty was given 10 days to respond to somewhat confusing findings made by the magistrate on not only his ineffectiveness of counsel allegations, but each of the five other allegations as well. It is not surprising to find no response to such a general directive from a *pro se* petitioner.

To remedy this dilemma, district courts are authorized under Rule 4 "to take such other action as the judge deems appropriate" and under Rule 8 to dispose of a petition "as justice shall require." This does not foreclose returning the petition pursuant to Rule 2(e) even after the answer was filed and the record had been reviewed.

Additionally, the Advisory Committee Note to Rule 4 suggests other alternatives to dismissal, including authorizing the respondent to file a motion to make the petition more certain. Even after the state's answer was filed, this option remained open.

Finally, one purpose of Rule 4 is to provide for summary dismissal of petitions when it "plainly appears from the face of the petition . . . that the petitioner is not entitled to relief." Such a ruling would not have been made on the merits. *Sanders*, 373 U.S. at 19. If Petty's ineffective assistance claim had been summarily dismissed, then Petty would have been able to replead without facing a

defense that his prior petition had been considered on the merits.

III. THE FIFTH CIRCUIT PROPERLY EXERCISED ITS DISCRETION IN REMANDING PETTY'S CASE FOR AMENDMENT.

In the first paragraph of its opinion, the Fifth Circuit recognized that it could not, on the merits, consider the many facts that suggest possible prejudice which were presented by Petty for the first time on appeal. (AF-2). Though the Fifth Circuit discussed and commented upon Petty's allegation of prejudice stemming from his counsel's failure to investigate his possible insanity defense, those discussions played no necessary part in the Fifth Circuit's decision to remand.

The Fifth Circuit was faced with a situation in which a district court had dismissed a habeas petition due to a *Hill*—type defect in pleading. On its face, the district court's dismissal appeared to have been made on the merits. The Fifth Circuit's own review of the record, including Petty's new allegation of prejudice made for the first time on appeal, did not reveal that it was "beyond doubt" that Petty was entitled to no relief. Judgment on the merits was thus inappropriate.

The district court had bypassed every procedure which might have focused Petty's attention on his pleading defects. The Fifth Circuit was called upon to consider whether or not Petty's allegations were such that they could not possibly have been supported by a showing of prejudice. Importantly, the Fifth Circuit was considering an extreme situation in which Petty had been incarcerated since 1979 and had had his federal habeas petition on file since March 7, 1984.

The rule that appellate courts normally do not consider new facts on appeal was not ignored by the Fifth Circuit.

Indeed, the opinion referred to that general rule. (SF-2). However, the general rule is discretionary in nature. *See*, Annot., 76 A.L.R. Fed. 522, 524-26 (1986). More importantly, the rule is better fitted to a situation wherein the party presenting new facts on appeal has been represented throughout by counsel.

Where the writ of habeas corpus is involved, circuit courts can be expected to vary from this general rule, especially where *pro se* petitioners are before them. In *Harris*, 394 U.S. at 291, this Court stated:

> The scope and flexibility of the writ—its capacity to reach all manner of illegal detention—its ability to cut through barriers of form and procedural mazes—have always been emphasized and jealously guarded by courts and lawmakers. The very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected.

It was in the interests of justice and to flexibly administer the writ that the Fifth Circuit examined Petty's new claim of prejudice.

The State's argument that the Fifth Circuit's ruling serves to perpetuate this matter in court is also amiss. The effect of the ruling is to at last focus Petty, a *pro se* petitioner, upon the *Strickland* and *Hill* prejudice requirement so that he can replead and the district court can quickly reach the merits. Indeed, the Fifth Circuit's entire discussion of Petty's new prejudice claim is couched in terms of "efficiency" and "finality." (AF-5).

An example of how consideration of new evidence presented upon appeal promotes finality was *Norman* v. *McCotter*, 765 F.2d 504 (5th Cir. 1985). Therein, the *pro se* petitioner had failed to allege sufficient facts in his petition, but on appeal had filed an affidavit presenting new facts. The Fifth Circuit considered the affidavit, noting

that it did so "only because he is a pro se petitioner and only because he reasonably claims he would have submitted it to the district court had he been notified that the State's motion was going to be treated as a motion for summary judgment." *Id.* at 508, n.3. By reviewing the affidavit, the Fifth Circuit was able to fully consider the grant of summary judgment and affirm the district court's decision.

Finally, that the Fifth Circuit considered Petty's claim of prejudice is understandable considering the procedural background of this case. Neither *Strickland* nor *Hill* had been decided when Petty filed his petition. Petty filed his petition in accordance with the instructions on the Form provided to him by the district court. His petition was not returned at any point as insufficient even though the state, the magistrate and the district court each found it to be insufficient. Instead, the district court dismissed Petty's petition failing to utilize any of a number of procedures to expand the factual record, investigate Petty's allegations or bring the deficiencies to his attention.

The Fifth Circuit's decision does not undermine finality, nor improperly deny the state its defense of abuse of the writ. The district court's dismissal improperly reached the merits of Petty's action. The Fifth Circuit's decision recognized as much and made a correction, promoting the interests of justice and flexibily administering the writ of habeas corpus.

CONCLUSION

For the reasons stated above, Gregory Allen Petty prays that the decision of the United States Court of Appeals for the Fifth Circuit be affirmed.

Respectfully submitted,

BAKER & BOTTS
JOHN R. BREIHAN
1410 United Bank Tower
400 West 15th Street
Austin, Texas 78701
(512) 478-1234
Attorney for Respondent
Gregory Allen Petty

No. 85-1656 (5)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

O. L. MCCOTTER, Director
Texas Department of Corrections,

Petitioner,

—v.—

GREGORY ALLEN PETTY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE AMERICAN CIVIL LIBERTIE UNION AND THE TEXAS CIVIL LIBERTIES UNION, AMICI CURIAE IN SUPPORT OF THE RESPONDENT

LARRY W. YACKLE
Counsel of Record
Boston University School
of Law
765 Commonwealth Avenue
Boston, Massachusetts 02215
(617) 353-2826

GEORGE KANNAR
Counsel for Amici
American Civil Liberties Union
132 West 43rd Street
New York, New York 10036
(212) 944-9800

QUESTION PRESENTED

Whether, in a case in which some of a pro se habeas corpus applicant's allegations of fact come to light on appeal, it is within the sound discretion of the circuit court to remand to the district court to allow the prisoner an opportunity to amend, if the circuit court finds the circumstances warrant a remand in the interests of justice.

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INTEREST OF AMICI

The American Civil Liberties Union is a nationwide, nonpartisan organization of more than 250,000 members, dedicated to preserving and protecting the civil rights and civil liberties guaranteed by law. The Texas Civil Liberties Union is one of its state affiliates. The ACLU has long worked to protect the rights of criminal defendants and has filed many briefs, as counsel for individual litigants and as amicus curiae, in cases requiring the construction of federal statutes and rules and the interpretation of federal constitutional provisions related to criminal cases and the law of federal habeas corpus.

With the consent of the parties, indicated by letters lodged with the Clerk of this Court, we file this brief amicus curiae in support of the respondent.

STATEMENT OF THE CASE

The respondent, Gregory Allen Petty, is a Texas state prisoner serving a fifty-year sentence imposed in 1979 after he was convicted of aggravated robbery in a jury trial. Mr. Petty claims that his trial attorney rendered ineffective assistance in violation of the Sixth Amendment. Petty duly raised this federal claim in a pro se application for state habeas corpus relief; that application was denied by the Texas Court of Criminal Appeals in 1983.

On March 7, 1984, Petty raised the same claim in federal habeas corpus. He specifically alleged that his attorney had conferred with him only once before trial and on that occasion had urged him to plead guilty, that she failed to interview prospective defense witnesses, and that she was unprepared for trial before a jury. Petty's application was referred to a

magistrate, whose report, filed on April 24, 1984, recommended that the Sixth Amendment claim be denied because of Petty's failure to allege sufficient facts. The magistrate faulted Petty for failing to identify the witnesses that counsel might have interviewed or to identify other trial preparations that counsel might have made. In the magistrate's view, Petty had failed to demonstrate "any actual adverse impact upon fairness of his trial" resulting from counsel's claimed deficiencies.

Approximately two weeks later, on May 14, 1984, this Court held in Strickland v. Washington, 466 U.S. 668 (1984), that habeas applicants raising ineffective assistance claims must "show" both that counsel's performance was deficient and that counsel's deficient performance "prejudiced" the defense. On that same day, the district court accepted the magistrate's recommendation in this case.

In a pro se brief to the Fifth Circuit on appeal, received by the circuit court on November 8, 1984, Petty elaborated on his Sixth Amendment claim in light of Strickland. In that brief, he alleged that he had been committed to mental institutions on three separate occasions and had undergone out-patient psychiatric care for a number of years. If his trial attorney had investigated more thoroughly, he asserted, she would have developed evidence bearing on Petty's capacity to entertain the mental state essential for the offense of which he was charged.[1]

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[1] Petty also contended that counsel failed to investigate the way in which he had lost teeth after his arrest and thus failed properly to cross-examine the alleged victim, whose identification of Petty as the perpetrator depended in part on a recollection that the assailant had several missing teeth. The circuit court rejected that argument, and it does not figure in the Director's petition for review here. There is no cross-petition by Mr. Petty.

While Petty's appeal was pending before the Fifth Circuit, on November 18, 1985, this Court decided Hill v. Lockhart, 106 S. Ct. 366 (1985), in which it extended the two-prong formulation in Strickland to cases in which prisoners complain that counsel rendered ineffective assistance in connection with a plea of guilty. The Court affirmed the denial of habeas relief in Hill, at least in part on the ground that the prisoner in that case had not "alleged" sufficient "prejudice" to win an evidentiary hearing on his Sixth Amendment claim.

The Fifth Circuit addressed Petty's appeal still later, on January 3, 1986, and remanded the case to the district court so that Petty could be accorded an opportunity to amend his application to include allegations concerning his psychiatric history. The panel noted that if Petty had raised those allegations at the district

court level, he would have been entitled to an evidentiary hearing to determine whether counsel's failure to investigate had caused her to overlook a valid insanity defense at trial. The panel also took the view, however, that Petty's allegations should not be considered for the first time on appeal. Recognizing that Petty had been without professional representation in the district court, the circuit panel exercised discretion to remand the matter so that the prisoner, now represented by assigned counsel, could amend his habeas petition to include the new allegations.[2]

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[2] The circuit appointed counsel to represent Petty on appeal in this habeas action. Petty did not, however, have professional assistance in the preparation of his habeas petition or during any proceedings at the district court level. His specific allegations regarding prejudice flowing from defense counsel's failure to investigate were made in Petty's own pro se brief in the Fifth Circuit.

The circuit took note that such an amendment might raise exhaustion doctrine difficulties. Accordingly, the circuit made it clear that the district court should allow the warden to complain that Petty's allegations of "prejudice" had not been raised in state court.

This Court then granted the Director's petition for certiorari to review the circuit panel's disposition of Petty's appeal.

INTRODUCTION AND SUMMARY OF ARGUMENT

The problem presented by this case is a familiar one. Indigent state prisoners typically have no professional guidance in the preparation of federal habeas petitions and, accordingly, often present the district courts with pleadings lacking the polish generally expected from lawyers. Pro se prisoners also frequently fail to discern the inadequacies in their pleadings when they are identified in the custodian's response or, as in this case, a subsequent magistrate's report.

Federal courts like the Fifth Circuit, charged with implementing Congress' desire for a meaningful system of postconviction review in habeas, are experienced in handling procedural problems of this kind in a manner that protects all the interests at stake. This requires flexibility, discretion, and common sense. Thus

pleadings drafted by undereducated prisoners in their cells are not held to the standards ordinarily applied to lawyers; inconsequential litigation errors by pro se prisoners may be overlooked or handled in an ad hoc fashion groomed to the circumstances of a particular case. The courts are assisted and encouraged in this by especially flexible rules for habeas actions, promulgated by Congress in 1976.

The Fifth Circuit's disposition of the instant case is an excellent illustration of the entirely appropriate means by which the lower courts orchestrate habeas litigation on a daily basis. Our purpose in this brief is only to underscore the realism and fairness of the circuit court's actions. The Director asks the Court to hold pro se prisoners to litigation standards far more rigid than those applicable in ordinary civil litigation, in which opposing litigants are typically

represented by professional litigators. We urge the Court to reject this attempt to import into habeas practice rigid, indeed harsh, procedural requirements that ignore the realities of pro se litigation.

The Director makes two arguments: (1) that pro se habeas petitions which fail to allege specific prejudice flowing from defense counsel's substandard performance must be dismissed on the merits; (2) that if specific allegations going to prejudice come to light at the appellate level, the circuit courts lack the flexibility and discretion to allow a remand so that a petition can be amended.

The Director's initial contention is not merely wrong; it is, on the facts presented here, simply beside the point. The question in this case is not whether Mr. Petty's original allegations were sufficient to require an evidentiary hearing in the district court; the question

is whether the circumstances warranted more than summary treatment by the circuit panel on appeal. In any event, district courts have long had discretion to order hearings in habeas cases in which prisoners' applications are not sufficient to entitle them to such a hearing as a matter of right. Indeed, the habeas rules are founded precisely on the recognition that pro se litigants will be unable to provide the court and opposing counsel with all the information that may be necessary for full and fair adjudication. It is for that reason that the rules emphasize flexibility. This Court, too, has long directed the lower courts to apply less stringent pleading standards to pro se habeas applicants than to litigants represented by lawyers.

Second, and more to the point in the present case, any flaws identified in a pro se prisoner's application at the appellate

level can and should be handled in the appellate court's similarly broad discretion, with appreciation of the prisoner's disabilities and attention to the substantive interests of all parties. The Fifth Circuit did no more than remand to the district court for the express purpose of allowing Mr. Petty an opportunity to present the trial court and opposing counsel with a more detailed account of his claim. Such an order was a sound exercise of case-management discretion--particularly in this instance, when the pleading standards applicable to Sixth Amendment claims were only developing during the pendency of Mr. Petty's application, and, certainly, were unclear at the time he filed his petition in the district court. No genuine, substantive interest on the Director's part was jeopardized by the disposition below.

ARGUMENT

I. THE RIGID FACT-PLEADING STANDARDS URGED ON THE COURT IN THIS CASE FOR APPLICATION TO PRO SE HABEAS CORPUS PETITIONS ARE INCONSISTENT WITH THIS COURT'S PRECEDENTS AND THE HABEAS CORPUS RULES

Mr. Petty's pro se application for federal habeas relief in this case clearly alleged that he is in custody in violation of the Sixth Amendment, because his defense attorney rendered ineffective assistance at trial. Petty supported that claim in the district court with precise allegations of fact, namely that counsel consulted with him only once, failed to interview potential defense witnesses, and was unprepared for trial.

The Director argues, however, that more was required. Insisting that habeas applicants claiming ineffective assistance can succeed only by showing both that counsel's performance was substandard and

that that performance undermined confidence in the outcome of the trial, the Director contends that Petty's original petition should have spelled out how it was that counsel's failure to prepare for trial "prejudiced" Petty before the jury. The necessary outcome for any petitioner whose application fails this rigid pleading requirement, the Director insists, must be dismissal on the merits.

The Director's route to this conclusion is deceptively simple. This Court held in Townsend v. Sain, 373 U.S. 293 (1963), that habeas applicants have a right to a hearing only if they allege facts which, if true, would entitle them to relief. The applicable habeas rule, §2254 Rule 2(c), instructs prisoners not only to specify the grounds on which they seek relief, but to set forth the "facts" supporting those grounds. According to the Director, every habeas applicant must therefore parse the language of this Court's precedents

regarding the substantive claims they wish to pursue, identify the components of a successful collateral attack, and then include in their habeas petitions precise allegations touching every aspect of their claims. Since this Court's analysis of ineffective assistance claims contemplates both an examination of counsel's performance and an appraisal of the consequences of substandard representation, and since Mr. Petty focused on the former, Petty's original pleading was, by the Director's account, insufficient.

The Director concedes that his position may seem harsh. Professional litigators in ordinary civil litigation need offer only a "short and plain statement" of their clients' claims; fact-pleading is no longer required. It is even discouraged. Yet more demanding standards are appropriate in habeas, according to the Director, in order to allow the district courts to "screen" an alleged "inundation of litigation" in habeas.

The Director's argument is misguided at each of its critical junctures.

1.

The Director's discussion of Townsend assumes, incorrectly, that the question in this case is whether Mr. Petty was entitled as a matter of right to a federal evidentiary hearing on the strength of his original application for habeas relief. That simply is not the issue. In reviewing the Fifth Circuit's disposition of Petty's appeal, this Court must decide not whether Petty's petition might have been dismissed without a hearing, but whether the circuit court had discretion to deal with the matter more sympathetically. Townsend's rule for determining when a habeas hearing must be held is inapposite; the applicable principle, reaffirmed in Townsend, is that the habeas courts always retain power to hold evidentiary hearings in their discretion.

The Director's reliance on Rule 2(c) is also flawed. Although that rule does ask habeas applicants to set forth factual support for their claims, it also explicitly warns prisoners that they should provide the court only with a "summary" of what they wish an opportunity to prove in a hearing. The notion that a "summary" within the meaning of Rule 2(c) must ineluctably include a precise match of the elements of substantive claims and factual allegations in support would be troubling if habeas applicants were represented by experienced counsel skilled in constructing sophisticated pleadings. Given that undereducated prisoners like Mr. Petty are forced to find their own way, the Director's reading of Rule 2(c) is fatuous. No one reasonably can think that pro se habeas applicants would read Rule

2(c) to mean what it quite obviously does not say.

The Director's contention regarding Rule 2(c) is not only mistaken; it reveals a deeper misconception regarding the framework for appraising pro se habeas applications established by the habeas rules generally. Far from directing the district courts to fly-speck habeas applications for conformity to precise pleading rules and to dismiss nonconforming petitions summarily, Rule 2(c) merely describes the first stage of a carefully-tailored process, promulgated by Congress, by which the habeas courts consider crudely-drawn documents fashioned by undereducated prison inmates.[3]

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[3] The Director's explanation of the need for a screening device, the weight of habeas litigation, is simply out of date. Sophisticated analysis of recent data indicates that the rate of habeas filings has declined over the past few years--while the population of state prisons has soared. See Resnik, Tiers, 57 So. Calif. L. Rev. 837, 939-51 (1984).

First, the habeas rules anticipate that pro se applicants will be unable to draft petitions providing the court, and the respondent, with all the information that may be needed for full and fair adjudication. That is why Rule 2(c) asks only for a "summary" of the facts as the applicant sees them and why the form provided to pro se applicants directs prisoners to state their claims only "briefly." Pro se litigants are not expected to analyze this Court's precedents, to extract and distinguish the several elements of constitutional claims, to identify relevant facts, and then to bring the product of their labors to bear upon their own cases. Rather, prisoners are told only to state the substance of their claims, briefly and summarily.

Second, the habeas rules establish various means of obtaining an elaboration of pro se applicants' claims after a

petition is filed. Rule 4 authorizes the court to entertain special pleadings from the custodian, including a motion for a more definite statement of the claim pursuant to Rule 12(e) of the Federal Rules of Civil Procedure.[4] Rule 6 provides for thorough discovery on leave of court, and Rule 7 establishes a mechanism for expanding the record still further if the circumstances are appropriate. These rules plainly contemplate that pro se litigants in habeas will not produce initial pleadings and supporting data that would be expected in ordinary litigation in which the moving party is professionally represented. They recognize that pro se applications may be incomplete and, accordingly, establish machinery by which the court and the custodian can clarify what is at stake and deal with claims fairly.

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[4] See §2254 Rule 11 (explaining that the civil rules may be applied in habeas actions when they are "not inconsistent" with the habeas rules).

The Director ignores this Court's decision in Haines v. Kerner, 404 U.S. 519 (1972). In Haines, the Court recognized and endorsed the tradition under which the habeas courts hold pro se applicants to "less stringent standards" than are applied to "formal pleadings drafted by lawyers." The habeas courts may often read a pro se applicant's crude petition in the most favorable light, finding it to allege sufficient facts to withstand dismissal.[5]

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[5] The Director suggests that Haines comes into play only after a petition has been found to meet stringent pleading standards and, at that point, admonishes the district courts not to discount well-pleaded petitions because the veracity of their allegations appears questionable. Yet the Haines per curiam focuses explicitly on the specificity of a petition's allegations and says nothing about the resolution, at this stage, of doubts regarding the applicant's veracity.

* * * *

This brief description, rather than the Director's narrow vision, begins to capture the richness of the framework within which the lower federal courts grapple with pro se habeas corpus litigation. We should be surprised if any less flexible process could be acceptable--to Congress, to the lower federal courts, or, certainly, to this Court. If prisoners' access to the federal forum in habeas is to be meaningful, not illusory, the vexing problems faced by pro se litigants must be appreciated and mitigated by realistic federal judges treating such applications as "law and justice require." 28 U.S.C. §2243.

In this instance, Mr. Petty should be credited with providing the district court and the Director with a fair account of his

complaints concerning his defense attorney. The record reflects no uncertainty regarding the substance of his claim. The Director filed no request for elaboration. While the district court faulted Petty for failing to explain why he thought counsel's deficiencies had affected the trial, that court would have been warranted in reading Petty's contention that his attorney had not investigated thoroughly to allege, implicitly, that such an investigation would have turned up evidence useful to the defense.[6] It is hard, in fact, to understand Petty's claim in any other way. At all events, of course, the Fifth Circuit remanded the case to the district court to permit Mr. Petty to clarify his contentions regarding the effect of counsel's failure to

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[6] Again, however, the sufficiency of Petty's original allegations is not before the Court.

investigate. Accordingly, even if this Court should conclude that Petty's original application was insufficient, there is no basis for reversing the judgment below.[7] The substantive standards for pleading in ineffective assistance claims are not directly in issue here. The discretion of the circuit courts to manage their dockets is.

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[7] The Director seizes upon a single sentence in the Fifth Circuit's opinion, to the effect that "Strickland requires that prejudice be proved, not pleaded." 779 F.2d at 302. That statement is accurate, of course, inasmuch as it says nothing of any further requirement indicated by Hill. At all events, this Court reviews judgments, not opinions.

II. THE FIFTH CIRCUIT'S REMAND TO PERMIT AMENDMENT IN THIS CASE WAS CONSISTENT WITH PRUDENT CASE MANAGEMENT AND AFFECTED NO LEGITIMATE INTEREST ON THE DIRECTOR'S PART

As a second ground of complaint, the Director insists that the Fifth Circuit should have ignored Mr. Petty's more specific allegations regarding the effect of his attorney's failure to investigate his psychiatric history, because Petty clarified his contentions in that respect in his pro se brief on appeal.

The Director's argument here is in three parts: (1) that the circuit's action amounted to entertaining at the appellate level claims not seasonably raised in the district court; (2) that Petty bypassed an opportunity to amend his petition at the district level; and (3) that the remand thwarted the Director's opportunity to plead abuse of the writ in response to Petty's "new" claim of prejudice flowing

from counsel's failure to investigate. None of these points is sound.

1.

There is a good deal of difference between the sin of which the Director charges the circuit (determining a claim raised for the first time on appeal) and the dispensation the circuit actually extended (a remand and permission to amend to elaborate on a claim).

Nothing in the federal rules or in case law bars a federal court from exercising prudence in the disposition of cases on its docket. In this instance, a pro se habeas applicant had done his level best in the district court and, when he realized that he had been turned away at that level on the basis of an omission from his pleading, tried as best he could to correct that oversight before the next court to which he

came. The circuit hardly displayed inappropriate sympathy in such a case merely by remanding for purposes of an amendment.

The shortcoming said to exist in Petty's petition, moreover, was entirely understandable in the peculiar circumstances of this case. Neither Strickland nor Hill had been decided when Petty filed his original petition: Strickland was handed down on the very day the district court dismissed; Hill was decided after Petty filed his appellate brief. Thus the nature of the substantive claim Petty sought to raise, and certainly the attendant pleading standards he might be expected to meet, were in flux at the very time he acted, as a pro se petitioner, on his own behalf. In these circumstances, the Fifth Circuit's exercise of discretion

was not merely acceptable; it was the only reasonable and just course available.[8]

2.

The Director's argument that Petty had notice of the need to raise his specific allegations regarding "prejudice" at the district level is equally unavailing. Neither the district court nor, certainly, the Director actually notified Petty of any requirement that he file a more complete pleading. The only basis for the Director's contention is that the magistrate's report, filed two weeks before the district court's judgment, recommended dismissal in part on the ground that Petty had not sufficiently explained the consequences of counsel's deficiencies.

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[8] This case presents no question regarding the retrospective application of Strickland or Hill. We note the timing of those decisions only to place the disposition below in proper context.

That report, according to the Director, should have moved Petty to amend his petition.

The trouble with this argument is the same as with the Director's other contentions. It is unrealistic. First, the magistrate's report did not explain to this pro se litigant that his pleading was inadequate and that he might move to amend it in time to avoid dismissal. On the contrary, the report included only the usual boilerplate to the effect that the parties could file objections with the court within ten days. It offends reason to think that a prisoner in Petty's place could read explanations of that kind and understand that he might now do something entirely different. Perhaps an experienced litigator might have discerned the danger and seized the opportunity to attempt an eleventh hour amendment. But not a prisoner in his cell.

Second, the contention that Petty, or any prisoner, could have done anything in response to the magistrate's report is, again, unrealistic. The confusion and delays surrounding prisoners' mail are a matter of public record. The record does not show when Petty actually received the report; nor does it reflect the time he had to decipher the magistrate's language, to identify the implications, to locate a means of avoiding dismissal, and to get a motion for amendment back to the clerk. Yet in all fairness, it is simply unrealistic to think that Petty had a genuine opportunity to do what the Director insists he should have done.

3.

The Director's final argument is that the remand undercuts his opportunity to plead "abuse of the writ" pursuant to 28 U.S.C. §2244(b) and §2254 Rule 9(b). The

statute and the rule, of course, codify the standards for multiple collateral petitions established by this Court in Sanders v. United States, 373 U.S. 1 (1963). See Rose v. Lundy, 455 U.S. 509, 521 (1982). Those standards are familiar. First, in cases in which an applicant files a successive petition raising a claim dismissed on the merits in a previous habeas action, a habeas court has power to reconsider the claim, but may dismiss in its discretion unless the ends of justice would be served by reaching the merits a second time. Second, in cases in which an applicant asserts a claim that might have been, but was not, raised in a prior application, a habeas court again has power to reach the merits, but may dismiss if the petitioner's failure to assert the claim in the previous action constituted an abuse of the writ.

Initially, the Director mischaracterizes his argument in this case as falling under the second, "abuse of the writ" standard

described above. Evidently, the Director conceives of Mr. Petty's allegation that an investigation of his psychiatric background would have turned up evidence supporting an insanity defense as a "new or different" claim for relief, independent of the ineffective assistance of counsel claim Petty raised initially. On this understanding, the Director complains that the opportunity accorded to Petty to amend his petition in this proceeding amounts to a chance to add a new claim--after, by the Director's account, his original application has been denied on the merits.[9] If, in

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[9] The Director refers to Petty's allegations as not only "new," but "unexhausted"--intimating that the remand allowed by the circuit court raised difficulties associated with the exhaustion doctrine. That is not the case. The circuit expressly noted that the Director might complain that Petty had not raised his allegations regarding what a pre-trial investigation would have uncovered in state court and instructed the district court to entertain such an objection if it was filed. 779 F.2d at 302. Of course, the validity of any exhaustion issue was not before the court below and is not before this Court now.

contrast, the Fifth Circuit had affirmed the district court's denial of relief, Petty would be able to raise his "new" claim only in some future petition. And the Director would be able, in that future proceeding, to argue that Petty abused the habeas process by withholding this "new" claim from his original petition.[10]

This analysis is flawed in that Petty's allegations regarding what an investigation by counsel would have revealed merely elaborate upon his theory that counsel's failure to investigate amounted to ineffective assistance. The assertions on which the Director focuses have nothing to

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[10] Of course, the Fifth Circuit did not affirm the denial of relief. Rather, the circuit chose to remand the matter for the purpose of an amendment before making any judgment regarding the substantive sufficiency of Petty's allegations. To the extent the Director assumes in his argument that the circuit found an amendment essential to keep Petty's Sixth Amendment claim in court, the Director is reading into the disposition below a substantive legal determination that plainly was not made.

do with any "new" claim within the meaning of Sanders, §2244(b), and Rule 9(b). There is nothing whatever in this case to suggest a purpose on Petty's part deliberately to withhold an independent claim from his first petition in order to produce future proceedings "whose only purpose is to vex, harrass, or delay." Sanders, 373 U.S. at 18-19.

If the Director has any argument at all in this context, it is under the first Sanders standard. The opportunity to amend accorded to Mr. Petty by the Fifth Circuit avoids an immediate dismissal on the merits of his Sixth Amendment claim, unsupported by his allegation that an investigation by counsel would have turned up evidence of insanity. If Petty were to suffer such a dismissal now, and in future were to file a successive petition asserting these allegations, the Director might be in a position to argue that the successive

petition raises the same claim and that the merits should be reached only if reconsideration would serve the ends of justice.

Yet if this is the Director's argument, it misunderstands Sanders, the statute, and the rule at an even more fundamental level. The working idea is that, all things being equal, one full and fair adjudication of a habeas applicant's claim should suffice. Yet nothing in the relevant standards suggests that the initial treatment of a claim should be terminated unseasonably, that the unfavorable determination produced by such haste should be formalistically labeled "on the merits," and that later consideration should be cut off in the name of efficiency. The settled law in this context depends upon a full and fair adjudication in the first instance and only then permits summary dismissal of a successive petition.

The Fifth Circuit's action below is designed to foster just such full and fair treatment of Mr. Petty's Sixth Amendment claim--to marshal all his supporting allegations for a single, thoroughgoing examination by the district court. If, after he has done so and the court has given the case its considered judgment, the decision is unfavorable to the applicant, any future attempt on his part to relitigate the same claim may face demanding standards. Of course, Mr. Petty himself has suggested no intention of filing successive applications based on this same ineffective assistance claim. He seeks an authoritative determination of that claim in this, his first attempt to bring it before the federal courts. The specter of successive petitions is raised in this case only by the Director, and then only because the Director urges a

disposition that might lead Mr. Petty to try again.[11]

CONCLUSION

For the moment at least, Congress has declined to guarantee professional representation to state prisoners seeking federal habeas corpus relief. Instead, Congress has established compensating procedural machinery by which the habeas courts handle pro se applications with

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11 If the Director were to succeed here, and this Court were to instruct the lcwer courts to dismiss the current petition, Petty would be free to file a successive petition raising the same Sixth Amendment claim and supporting it with his allegations regarding what an investigation by counsel would have produced. While such a petition might elicit a motion to dismiss (on the ground that it raises the same claim once determined against the prisoner), Mr. Petty might well establish that the ends of justice could be served by reconsideration. For his claim that counsel's defaults frustrated a defense of insanity raises a serious question of his guilt or innocence of the offense charged in state court. Kuhlmann v. Wilson, 106 S. Ct. 2616 (1986).

patience and sensitivity, ensuring that prisoners are not turned away by steep procedural barriers that it would be just to deploy, if at all, only against experienced lawyers. The action taken by the Fifth Circuit in this case is a simple illustration of the scheme's operations. The disposition below was entirely appropriate and routine--in keeping with settled, sensible guidelines for pro se litigation promulgated by Congress and reinforced by this Court's precedents. Accordingly, the circuit judgment should be affirmed.

Respectfully submitted,

LARRY W. YACKLE
Counsel of Record
Boston University
School of Law
765 Commonwealth Avenue
Boston, Massachusetts 02215
(617) 353-2826

GEORGE KANNAR
Counsel for Amici
American Civil Liberties Union
132 West 43rd Street
New York, New York 10036
(212) 944-9800